

ACT AUDITOR-GENERAL'S REPORT

**CAMPBELL PRIMARY SCHOOL
MODERNISATION PROJECT PROCUREMENT**

REPORT NO. 13 / 2021

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Audit Team

Kate Mest

Kellie Plummer

Matthew Bowden

Produced for the Office of the ACT Legislative Assembly by the ACT Audit Office, ACT Government.

ACT Government Homepage address is: <http://www.act.gov.au>

PA 21/01

The Speaker
ACT Legislative Assembly
Civic Square, London Circuit
CANBERRA ACT 2601

Dear Madam Speaker

I am pleased to forward to you a Performance Audit Report titled 'Campbell Primary School Modernisation Project Procurement' for tabling in the Legislative Assembly pursuant to Subsection 17(5) of the *Auditor-General Act 1996*.

The audit has been conducted in accordance with the requirements of the *Auditor-General Act 1996* and relevant professional standards including *ASAE 3500 – Performance Engagements*.

Yours sincerely



Michael Harris
Auditor-General
22 December 2021

The ACT Audit Office acknowledges the Ngunnawal people as traditional custodians of the ACT and pays respect to the elders; past, present and future. The Office acknowledges and respects their continuing culture and the contribution they make to the life of this city and this region.

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SUMMARY

A procurement for design and construction services for the Campbell Primary School Modernisation Project was undertaken between July 2019 and September 2020. From a broader Request for Expressions of Interest (REOI) process to which six firms responded, two tenderers were invited to participate in a Request for Tender (RFT); Lendlease Building Pty Ltd and Manteena Commercial Pty Ltd. Lendlease was awarded the contract for services in September 2020 and work commenced under the contract in January 2021.

In November 2020 a representation was made to the ACT Audit Office in relation to the conduct of the procurement process. In April 2021 the Auditor-General commenced a performance audit which considered the effectiveness of the procurement process. The performance audit considered the probity of the procurement process, as well as governance and administrative arrangements.

Conclusions

THE PROCUREMENT PROCESS

The procurement process for the Campbell Primary School Modernisation Project lacked probity. Tenderers were not dealt with fairly, impartially and consistently.

Manteena was identified as the preferred tenderer by two different tender evaluation teams at two key stages of the procurement process; the Request for Tender stage and the subsequent Best and Final Offer stage. Manteena received the highest scores against the weighted evaluation criteria and quoted a lower price for the services. Despite this Lendlease was awarded the contract for the services.

In June 2020 the Tender Evaluation Team prepared a Tender Evaluation Report that identified Manteena as the preferred tenderer. The Delegate disagreed with the Tender Evaluation Team's recommendation and instead recommended to the Director-General that Lendlease be identified as the preferred tenderer because they offered the 'best value for money'. In making this recommendation the Delegate noted that Lendlease outscored Manteena on three of the six weighted evaluation criteria (comprising 30 percent of the criteria) and asserted that these criteria 'are reliable long term indicators of a company's ability to deliver quality projects and government initiatives such as Secure Local Jobs'. The Delegate acknowledged that Manteena outscored Lendlease on the other three criteria, including the design solution submitted as part of the tender process, but that because intellectual property in the design submissions put forward by the tenderers vested in the Territory 'the best elements of each design can be used in the upcoming design development phase'.

In making the recommendation to the Director-General the Delegate effectively re-weighted and re-prioritised the evaluation criteria. Decision-making was not based on the evaluation criteria with

which the Territory approached the market and sought tenders. Probity was not demonstrated in the procurement process to ‘deal fairly, impartially and consistently with suppliers’.

GOVERNANCE AND ADMINISTRATIVE MATTERS

During the course of the audit a number of governance and administrative shortcomings in the procurement process were identified. These relate to the documentation of roles and responsibilities, procurement risk management (including probity risk management), the use of *Confidentiality and Conflict of Interest Undertaking forms* by participants, communication processes with tenderers and the tender debrief process.

A risk relating to the probity of the procurement process was the participation and involvement of various staff from Major Projects Canberra and the Education Directorate whose roles and responsibilities were not specifically and explicitly documented in procurement governance documents such as the *Tender Evaluation Plan (July 2019)* or *Procurement Plan Minute (July 2019)*. Managers and supervisors had an ‘oversight’ and ‘quality assurance’ role which involved reviewing draft tender evaluation reports completed by the Tender Evaluation Teams. This allows for potential influence or interference to occur without explicit and specific clarity on their role and purpose.

The procurement process was also characterised by informal, uncontrolled and poorly documented communication with tenderers and other parties. This undermines the probity of the procurement process.

Key findings

THE PROCUREMENT PROCESS

Paragraph

Manteena and Lendlease submitted tenders on time and in conformance with the requirements of the RFT. Manteena provided a total tender price of \$17,303,579 (GST ex) and Lendlease provided a total tender price of \$18,768,465 (GST ex). Manteena was over the Territory’s budgeted amount by 11.4 percent and Lendlease was over the budgeted amount by 20.8 percent. The members of the Tender Evaluation Team separately reviewed the tenders that were received, met to discuss their assessments of the tenders and prepared a draft Tender Evaluation Report. The draft Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers’ assessment against each criterion and a proposed recommendation. Manteena was given a total score of 79 and Lendlease was given a total score of 52. The draft Tender Evaluation Report recommended Manteena as the preferred tenderer and that the Tender Evaluation Team ‘be authorised to enter into contract negotiations ... [to] identify areas of de-scoping and cost savings, in conjunction with the TET, to bring the project within the target cost of the design and construction component of the project’. The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate),

2.44

became apprised of the proposed outcome of the RFT process and indicated their disinclination to agree with the draft Tender Evaluation Report.

The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate), engaged in the procurement process prior to the Tender Evaluation Team having the opportunity to conclude its evaluation of the tenders and make a recommendation. This is not consistent with probity better practice or the *Tender Evaluation Plan* (July 2019) and this allowed the Delegate to influence the recommendation of the Tender Evaluation Team. 2.51

The draft Tender Evaluation Report recommended that a 'value management process' be entered into with Manteena. This is a process that can be used in circumstances where the tendered price exceeds the available budget. However, the Acting Executive Group Manager, Business Services Division (Education Directorate), as the delegate for the procurement, requested consideration of a Best and Final Offer (BAFO) process. The conduct of a BAFO process was inherently more beneficial to Lendlease than it was to Manteena, based on the Tender Evaluation Team's assessment, as identified in the draft Tender Evaluation Report. Manteena had identified a lower tender price and had scored significantly higher against the evaluation criteria; there was much more potential for Lendlease to improve its tender, relative to Manteena. Legal advice was sought from the ACT Government Solicitor's Office, which identified that the conduct of the BAFO process was permissible provided certain criteria and requirements were met. 2.82

The Tender Evaluation Team produced an amended and signed version of the draft Tender Evaluation Report (i.e. the first signed Tender Evaluation Report) on 18 March 2020. Similar to the draft Tender Evaluation Report, the first signed Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers' assessment against each criterion and a proposed recommendation. The score and ranking of the two tenderers was the same as in the draft Tender Evaluation Report, but there were differences in the qualitative assessment of each tender proposal compared with the draft Tender Evaluation Report. The first signed Tender Evaluation Report was not signed or endorsed by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the delegate. The first Tender Evaluation Team was subsequently asked to re-evaluate the tenders, but at least one member of the Tender Evaluation Team identified that they did not wish to participate in a re-evaluation process and the first Tender Evaluation Team was disbanded. 2.94

On 27 March 2020 the Acting Executive Group Manager, Business Services Division (Education Directorate) agreed to the appointment of a second Tender Evaluation Team. Similar to the first Tender Evaluation Team, the second Tender Evaluation Team included representatives from both Major Projects Canberra as well as the Education Directorate. The second Tender Evaluation Team produced a Tender Evaluation Report, which was signed by the two members and the chair on 6 April 2020 respectively. Manteena was given a total score of 69.1 and Lendlease was given a total score of 68.4. The report identified that the two tenderers 'both presented strong technical proposals and were low risk for the Territory' and that 'the scores based on each submitted tender were too close to clearly recommend a preferred tenderer'. The report concluded a BAFO process be entered into. The second signed 2.107

Tender Evaluation Report made the same recommendation as the first signed Tender Evaluation Report but the scores between the two tenderers were much narrower. The second signed Tender Evaluation Report was approved by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the Delegate on 8 April 2020.

In response to a request for a Best and Final Offer from the two tenderers, Manteena provided a revised tender price of \$15,100,000 (GST ex) and Lendlease provided a revised tender price of \$15,997,366 (GST ex). The tenderers were asked to revise their tenders against three of the six weighted criteria from the original RFT process, namely: WC3: a demonstration that the project will be completed within the contract period (20 percent); WC4: a clear understanding of the project (30 percent); and WC5: financial offer (20 percent). The scores for the remaining three criteria from the original RFT process were to remain. A third signed and final Tender Evaluation Report was prepared and signed by the second Tender Evaluation Team. The report gave Manteena a score of 76.1 and Lendlease a score of 67.4. The report stated 'Manteena have presented a strong and cost-efficient design proposal that provides best value for money, and the lowest risk profile' and sought approval to enter into a contract for Phase 1 of the project with Manteena. At the time the Acting Executive Group Manager, Business Services Division (Education Directorate) did not sign or endorse the third signed Tender Evaluation Report, but instead provided an Executive Brief to the Director-General of the Education Directorate that sought approval to enter into a contract for Phase 1 of the project with Lendlease.

2.141

The reasoning for the recommendation to the Director-General is embodied in four paragraphs in the Executive Brief. In making the alternative recommendation to the Director-General, the Acting Executive Group Manager, Business Services Division (Education Directorate) was seeking to over-rule the professional advice of the Tender Evaluation Team. It was therefore incumbent on the Acting Executive Group Manager, Business Services Division (Education Directorate) to adequately and appropriately document their rationale and reasoning. This did not occur. There was inadequate documentation to support the recommendation to enter into a contract with Lendlease, as opposed to Manteena. A key factor in the decision was an expectation that the Directorate was assigned the Intellectual Property of the tenderers, in the form of the re-design of the buildings, so that the 'best elements of each design can be used in the upcoming design development phase'. The Audit Office considers that the assignment of the Intellectual Property rights for the re-design of the school buildings from the unsuccessful tenderer was not a *fait accompli*, and the presumption that 'the best elements of each design can be used in the upcoming design development phase' was incorrect.

2.142

The Acting Executive Group Manager, Business Services Division (Education Directorate) produced a document in February 2021 that sought to provide further insight and explanation as to their recommendation to the Director-General to enter into a contract with Lendlease. The February 2021 document acknowledged that 'Manteena outscored Lend Lease on the criteria directly influenced by their design' but that Lendlease 'had closed the pricing gap (based on the limited feedback they received as part of the BAFO) ... [and] in a design and construct contract, those design refinements could be continued by whichever company was in contract with the

2.152

territory in a detailed design phase'. This is unfair. Such an assessment does not fairly value or reward the efforts of a tenderer and the merits of their tender.

The February 2021 document identified that the protracted procurement process for the Campbell Primary School Modernisation Project created risks for the delivery of the project and it asserted that Lendlease was in a stronger position to manage these risks due to 'long term factors'. In doing so, the Acting Executive Group Manager, Business Services Division (Education Directorate) referred to their previous role as the Secure Local Jobs Code Registrar between November 2018 and January 2020, and how knowledge and understanding from this experience had influenced their consideration. The conduct and timing of the procurement process, including the decision to go to a BAFO process, was within the responsibility and control of the Territory; it is unfair to identify risks deriving from the protracted procurement process as a basis on which to penalise a tenderer that had consistently been identified as the preferred supplier throughout the process. The Acting Executive Group Manager, Business Services Division (Education Directorate) asserted that Lendlease was likely to perform better based on 'long term factors'. In their response to the draft proposed report the Acting Executive Group Manager, Business Services Division (Education Directorate) advised that this assessment was based on the second Tender Evaluation Team's assessment of the RFT responses and the scoring of 'WC1 – past performance' (Lendlease received a score of 8 and Manteena received a score of 7).

2.158

The *Tender Evaluation Plan* (July 2019) allowed for an 'overall assessment of value for money' and countenanced that the preferred tenderer might not be the 'the tenderer with the highest score'. In doing so, however, the *Tender Evaluation Plan* (July 2019) required that 'full justification for selection of another will be provided'. This did not occur at the time of the decision by the Director-General of the Education Directorate. Subsequently, in February 2021 and in June 2021 in an interview under oath or affirmation, the Acting Executive Group Manager, Business Services Division (Education Directorate) sought to provide a rationale as to why they believed the tenderer with the higher price and lower score against the weighted evaluation criteria offered 'overall value for money'. In doing so they effectively re-weighted and re-prioritised the evaluation criteria with which the Territory approached the market and sought tenders. Probity was not demonstrated in the procurement process to 'deal fairly, impartially and consistently with suppliers', as provided for by *Procurement Policy Circular PC 21: Probity and Ethical Behaviour*.

2.166

GOVERNANCE AND ADMINISTRATIVE MATTERS

Paragraph

In its response to the RFT, Lendlease identified a number of proposed departures from the Territory's standard contractual terms and conditions. The most significant proposed departure sought to limit the sum payable as compensation to the Territory for any loss arising from a breach of contract by Lendlease to 50 percent of the value of the contract. There is evidence that the Chair of the first Tender Evaluation Team identified the proposed changes to the standard contractual terms and conditions as a risk in February 2020, but they were not specifically and explicitly documented in any of the tender evaluation reports that were subsequently produced by either of the Tender Evaluation Teams. Following the identification of Lendlease as the preferred tenderer in late June 2020 Major Projects Canberra

3.29

commenced negotiations with Lendlease, with the major focus of negotiation being the proposed cap on general liability. Considerable effort was put into the negotiations, which were finally concluded on 10 September 2020, with Lendlease agreeing to a cap on general liability of 200 percent of the value of the works. The effect of accepting a lower cap on liability is that the Territory has less recourse to pursue the contractor for damages, costs and any losses incurred. The time taken to negotiate the final contract put further pressure on the delivery of the project.

The *Procurement Plan Minute* (July 2019) and the *Tender Evaluation Plan* (July 2019) identified four members of the Tender Evaluation Team and documented their role and responsibilities in the procurement process. In addition to the Tender Evaluation Teams, a range of staff in both Major Projects Canberra and the Education Directorate were involved in the procurement. Managers and supervisors had an ‘oversight’ and ‘quality assurance’ role, which involved reviewing draft tender evaluation reports completed by the Tender Evaluation Teams. There is also evidence that advice was sought from other Major Projects Canberra officers at various times during the procurement. The *Tender Evaluation Plan* (July 2019) notes the ‘[Tender Evaluation Team] may, as required, utilise specialist advice to assist in the evaluation process’ and that ‘the areas of expertise may include ... probity and technical procurement advice, including from the ACT Government Solicitor and IFCW Directors/Managers (such advice may include, but not be limited to, technical drafting advice and review of draft evaluation reports for clarity and consistency with the *Government Procurement Act 2001* (ACT) and the [Request for Tender]’. There is no further information with respect to the roles and responsibilities of these other participants and the nature and purpose of their participation. This allows for potential influence or interference to occur without explicit and specific clarity on their role and purpose. The lack of clarity associated with the role and responsibilities of these other participants increases the probity risks for the procurement.

3.42

A Procurement Risk Management Plan was developed for the Campbell Primary School Modernisation Project procurement. The Plan was an attachment to the *Procurement Plan Minute* (July 2019). The Plan identified a range of risks that were relevant at the outset of the procurement, with related treatments and responsible owners identified to manage each risk. There was no evidence that the Procurement Risk Management Plan was reviewed or updated during the procurement process. By not reviewing and updating the Procurement Risk Management Plan as necessary during the procurement, there was a missed opportunity to use it as an ongoing tool to help manage the increasing risks associated with the procurement.

3.48

There was limited consideration of probity considerations in the Procurement Risk Management Plan. One probity-related risk was identified (unethical tender process or inadequate tender and evaluation leads to a breach of probity) for which the controls to manage this risk were identified as ‘effective’. There is no evidence that this probity risk was monitored and reported against throughout the procurement; the risk was not updated, and the controls re-assessed, at key developments of the procurement process which appeared to give rise to additional or enhanced risks.

3.60

The *Tender Evaluation Plan* (July 2019) required ‘evaluation team members, specialist advisors and Consultants ... to provide written acknowledgement of confidentiality and declaration of conflicts of interest prior to the commencement of

3.69

the evaluation process using the appropriate form'. To assist with this Major Projects Canberra has developed a *Confidentiality and Conflict of Interest Undertaking* form'. A *Confidentiality and Conflict of Interest Undertaking* form was evident for five of the six members of the Tender Evaluation Teams that had responsibility for evaluating the tenders as well as the officer identified as having an Observer role for the first Tender Evaluation Team (the Audit Office was advised that a form was completed for one of the members of the Second Evaluation Team but it was unable to be produced). No forms were prepared for any of the other participants in the procurement process. By not ensuring that a *Confidentiality and Conflict of Interest Undertaking* form is completed by all participants in the procurement process, Major Projects Canberra is not rigorously and comprehensively ensuring that all potential conflicts of interest are acknowledged as appropriate.

Appropriate, controlled and transparent communication processes are necessary in a procurement process to ensure all suppliers are dealt with fairly and equitably. Communication with tenderers was not appropriate, controlled or adequately documented. There was evidence of: individual communication with tenderers; communication not being recorded; and communication with third parties in relation to the procurement process. No specific Communications Plan or Communications Protocol was developed or implemented for the procurement. By not consistently and transparently communicating with tenderers, and communicating with third parties in relation to the procurement, the probity risks associated with the procurement process are increased. 3.79

A tender debrief process is useful for unsuccessful tenderers to identify why they were not selected and how they can improve future tender submissions. The *Tender Evaluation Plan* (2019) identified that the Tender Evaluation Team would be responsible for 'debriefing unsuccessful respondents'. The usual practice was for the tender debrief process to be facilitated by Major Projects Canberra staff, who typically occupy the position of the chair of the tender evaluation team. Following the decision to appoint Lendlease as the preferred tenderer, contrary to the recommendation of the Tender Evaluation Team, the Director-General of Major Projects Canberra instructed that the tender debrief process was to be undertaken by Education Directorate representatives and that no Major Projects Canberra staff were to be involved. 3.88

On the basis of information provided in interviews under oath or affirmation, it is apparent that a meeting occurred online to discuss the tender process and it is apparent that it was attended by representatives of Manteena, the Acting Executive Group Manager, Business Services Division (Education Directorate) and the two Education Directorate members of the second Tender Evaluation Team. There is no documentary evidence or record maintained by the Education Directorate of this meeting. Participants recalled the tender process and assessment was discussed at this meeting. The Acting Executive Group Manager, Business Services Division (Education Directorate) recalled another meeting taking place in a coffee shop at which the tender process and assessment was discussed and this 'was very similar to what a debrief was, but it wasn't the debrief'. Notwithstanding the meetings at which the tender process and evaluation was discussed the Education Directorate and Acting Executive Group Manager, Business Services Division (Education Directorate) advised that the absence of Major Projects Canberra staff meant that a 3.89

tender debrief did not occur. A tender debrief was not conducted in an open, transparent and accountable manner.

Recommendations

RECOMMENDATION 1 PROBITY ADVICE

Major Projects Canberra, in cooperation with Procurement ACT, should review and revise its procurement guidance documentation, and associated templates, to explicitly require the preparation of independent probity advice where a delegate or decision-maker seeks to over-rule the recommendation of the tender evaluation team.

RECOMMENDATION 2 DOCUMENTATION OF ROLES AND RESPONSIBILITIES

Major Projects Canberra, in cooperation with Procurement ACT, should review and revise its procurement planning and tender evaluation templates and guidance documents to require:

- a) the identification and acknowledgement of all participants in the procurement process, including the Delegate and those with managerial and supervisory responsibilities; and
- b) the identification and documentation of the specific roles and responsibilities of all participants in the process.

RECOMMENDATION 3 RISK MANAGEMENT

Major Projects Canberra, in cooperation with Procurement ACT, should review and update its procedures for the management of risk as part of procurement processes. The revised procedures should require procurement managers to actively review risks, including probity risks, and their treatment throughout the entire process. The review should be explicitly documented.

RECOMMENDATION 4 CONFIDENTIALITY AND CONFLICT OF INTEREST UNDERTAKINGS

Major Projects Canberra, in cooperation with Procurement ACT, should review and update its procedures for the management of confidentiality and conflicts of interest as part of procurement processes. The revised procedures should require *Confidentiality and Conflict of Interest Undertaking* forms to be completed for all staff who have a role in a procurement process.

RECOMMENDATION 5 PROBITY AWARENESS TRAINING

Major Projects Canberra and the Education Directorate should require staff to have received probity awareness training before participating in procurement activities. The training should also identify how staff can elevate and raise any concerns with probity or conduct during a procurement.

RECOMMENDATION 6 TENDERER COMMUNICATION PROCESSES

Major Projects Canberra, in cooperation with Procurement ACT, should review and revise its procurement planning and tender evaluation templates and guidance documents to require, during the tender process, that:

- a) unless otherwise authorised by the chair of the tender evaluation team, the chair be solely responsible for communicating with tenderers in relation to the tender up until the delegate has approved a preferred tenderer; and
- b) the identification and authorisation of communication methods that allow records of communication to be captured in a timely and accurate manner.

Response from entities

In accordance with subsection 18(2) of the *Auditor-General Act 1996*, the Education Directorate and Major Projects Canberra were provided with:

- a draft proposed report for comment. All comments were considered and required changes were reflected in the final proposed report; and
- a final proposed report for further comment. As part of this process, recipients were offered the opportunity to provide a statement for inclusion in the final report in the Summary chapter.

In accordance with subsection 18(3) of the *Auditor-General Act 1996* other entities considered to have a direct interest in the report were also provided with extracts of the draft proposed and final proposed reports for comment. All comments on the extracts of the draft proposed report were considered and required changes made in the final proposed report.

Comments for inclusion in the Summary chapter were provided as follows:

Manteena

Manteena welcomes the Audit Office's performance audit of the Campbell Primary School Modernisation Project Procurement. While we are very disappointed in the outcomes of the procurement process, which have significantly affected Manteena and many other local Canberra based professional consulting and subcontracting organisations who contributed to the tender process, we are hopeful that all future procurement processes will not encounter similar failings in probity, fairness, impartiality and consistency.

Acting Executive Group Manager, Business Services Division (Education Directorate)

I'd like to acknowledge the areas identified for process improvement in this proposed report and fully support the recommendations which will serve to strengthen probity and provide the necessary clarity of roles and responsibilities, appropriate documentation and guidance for all parties involved in the procurement process.

1 INTRODUCTION

Campbell Primary School Modernisation Project

Campbell Primary School Modernisation Project

- 1.1 As part of the 2018-19 ACT Budget the ACT Government announced \$18.819 million for design and construction services for the Campbell Primary School Modernisation Project.
- 1.2 The project involves the construction of facilities that are intended to accommodate an additional 450 students at the school. The project was intended to include the construction of a canteen, the replacement of some of the school's roof, the refurbishment of the existing hall, landscaping and a new Science, Technology, Engineering and Maths (STEM) centre. Some aspects of the scope of the project have since been amended.

Procurement for design and construction services

- 1.3 The procurement for the design and construction services was intended to involve a two-stage procurement process:
 - a Request for Expressions of Interest (REOI) to interested, pre-qualified parties; and
 - a Request for Tender (RFT) to parties that were short-listed from the REOI process.
- 1.4 The REOI was issued on 30 July 2019. Six suppliers responded to the REOI and two, Manteena Commercial Pty Ltd (Manteena) and Lendlease Building Pty Ltd (Lendlease), were selected to proceed to the RFT stage of the procurement.
- 1.5 The RFT was issued on 30 October 2019. Both Manteena and Lendlease responded to the RFT and both bids exceeded the project's budget. At this stage it was decided to amend the procurement process and proceed to a Best and Final Offer (BAFO) process, through which the two tenderers were invited to amend aspects of their proposal to fit within the project's budget. On 8 April 2020, a Best and Final Offer request was made to the two tenderers.
- 1.6 In late June 2020 the Tender Evaluation Team identified Manteena as the preferred tenderer and made a recommendation to the Education Directorate delegate to enter into contract negotiations with Manteena. The Delegate did not agree with the Tender Evaluation Team's recommendation and instead made a recommendation to the Director-General of the Education Directorate that Lendlease be identified as the preferred tenderer. The Director-General agreed with this recommendation.
- 1.7 Following a period of contract negotiations Lendlease was provided with a Letter of Award on 10 September 2020 and a contract for the services was signed on the same day. Work commenced under the contract in January 2021.

- 1.8 In response to the draft proposed report the Acting Executive Group Manager, Business Services Division (Education Directorate), as the Delegate for the procurement, advised:

The procurement process occurred during the COVID-19 pandemic where organisational priorities in dealing with the impacts of the rapidly changing public health situation on our public schools, limited time available on particular projects and an increased emphasis was placed on reducing project delivery risk as much as possible.

Representation to the ACT Audit Office

- 1.9 In November 2020 a representation was made to the ACT Audit Office in relation to the conduct of the procurement process.
- 1.10 The ACT Audit Office undertook preliminary scoping into the matter in late 2020 and early 2021. In April 2021, the Auditor-General decided to conduct a performance audit of the Campbell Primary School Modernisation Project.

Roles and responsibilities

Education Directorate

- 1.11 The Infrastructure and Capital Works Branch in the Business Services Division of the Education Directorate is responsible for the overall management of ACT public school buildings and infrastructure, including the planning and construction of new schools, capital upgrades (modernisation of existing facilities) and repairs and maintenance. The Branch's Major Projects Section is responsible for the Campbell Primary School Modernisation Project.
- 1.12 For the procurement of design and construction services for the Campbell Primary School Modernisation Project, the Education Directorate:
- identified and articulated its design and construction service needs; and
 - worked with Major Projects Canberra in the conduct of the procurement. This involved:
 - having staff members participate in the tender evaluation process;
 - providing directorate and project-specific advice and input into the procurement process; and
 - providing delegate approval and sign-off of key processes and decisions.
- 1.13 The delegate for the procurement of design and construction services for the Campbell Primary School Modernisation Project was the Executive Group Manager of the Business Services Division. For much of the procurement process this role was filled in an acting capacity. Officers from the Major Projects section of the Infrastructure and Capital Works Branch had roles in the tender evaluation teams for the procurement.

Major Projects Canberra

1.14 Major Projects Canberra is responsible for:

- procuring and delivering infrastructure projects designated by the Chief Minister; and
- delivering other whole-of-government infrastructure projects in partnership with other directorates.

1.15 The Commercial Infrastructure Branch, within the Infrastructure Delivery Partners Group, was responsible for managing the procurement of the design and construction services for the Campbell Primary School Modernisation Project. The Commercial Infrastructure Branch managed the practical and administrative processes associated with the procurement, pursuant to procurement documentation approved by the Education Directorate (e.g. the Procurement Plan Minute and Tender Evaluation Plan). Officers within Major Projects Canberra were responsible for issuing the procurement documentation, receiving supplier responses and managing communication with the tenderers. Officers from Major Projects Canberra also chaired the tender evaluation teams.

Procurement principles

1.16 Section 22A of the *Government Procurement Act (2001)* (the Act) states that Territory entities 'must pursue value for money in undertaking any procurement activity' and that 'value for money means the best available procurement outcome'. Subsection 22A(3) provides that in pursuing value for money Territory entities must have regard to:

- probity and ethical behaviour;
- the management of risk;
- open and effective competition;
- the optimisation of whole of life costs; and
- anything else prescribed by regulation.

Probity in procurement

Probity in Procurement Guide (May 2021)

1.17 In December 2020 Procurement ACT released the *Probity in Procurement Guide*. The Guide was prepared after the conclusion of this procurement process, but otherwise provides useful information in relation to expectations for probity in procurement in the ACT public sector. The Guide was updated and re-issued in May 2021.

- 1.18 The *Probity in Procurement Guide* (May 2021) provides a definition of probity that is taken from Australian Government Department of Finance guidance. The Guide states:

Probity is the evidence of ethical behaviour, and can be defined as complete and confirmed integrity, uprightness and honesty in a particular process.

- 1.19 The *Probity in Procurement Guide* (May 2021) states 'probity must be observed at each stage of procurement' and in doing so provides a set of probity principles that 'apply to all procurements':

1. Consideration of an appropriately competitive process
2. Fairness and impartiality
3. Consistency, transparency, and accountability
4. Identification and management of conflicts of interest
5. Appropriate security and confidentiality arrangements

Procurement Circular 21

- 1.20 At the time of the conduct of the procurement, before the development of the *Probity in Procurement Guide*, *Procurement Policy Circular PC 21: Probity and Ethical Behaviour* was in place. The Circular similarly 'provides guidance on Territory entities' responsibilities in meeting the requirements of the procurement principle of probity and ethical behaviour'.

- 1.21 *Procurement Policy Circular PC 21: Probity and Ethical Behaviour* defines probity as:

... uprightness, honesty, incorruptibility, proper and ethical conduct, and propriety in dealings. Within Government, the word "probity" is often used in a general sense to mean "good process".

- 1.22 *Procurement Policy Circular PC 21: Probity and Ethical Behaviour* further states:

Probity is best seen as the evidence of ethical behaviour in a particular process. Probity ... contributes to sound procurement processes that accord equal opportunities for all participants. A procurement process that conforms to the expected standards of probity is one in which clear procedures, consistent with ACT Government procurement policies and legislation and the legitimate interests of tenderers, is established, understood and observed by all parties from the beginning of the process.

- 1.23 Amongst other things, *Procurement Policy Circular PC 21: Probity and Ethical Behaviour* states:

All public servants conducting procurement activities for a Territory entity must:

- perform the task honestly and without favour or prejudice;
- spend public money efficiently and effectively and in accordance with the law and government policy;
- deal fairly, impartially and consistently with suppliers;
- keep confidential all sensitive information obtained as part of the procurement activity;
- not have an actual conflict of interest in relation to the procurement activity; and

- not seek or accept any remuneration, gift, advantage or other benefit except as may be allowed in the normal course of their duties.

Audit objective and scope

Audit objective

1.24 The objective of the audit was to assess the effectiveness of Major Projects Canberra and the Education Directorate's procurement processes for the Campbell Primary School Modernisation Project.

Audit scope

1.25 The scope of the audit included consideration of the activities of the Education Directorate and Major Projects Canberra in procuring design and construction services for the Campbell Primary School Modernisation Project. The focus of the audit included consideration of:

- the planning, governance, and administrative arrangements in place to support the procurement; and
- the conduct of the procurement process itself, including:
 - compliance with relevant ACT Government procurement rules and guidelines; and
 - adherence to the principles of probity and ethical behaviour in the procurement process, including relevant ACT Government policies and procedures and the Institute of Internal Auditors' Probity Touchpoints, to ensure the procurement was defensible and fair.

1.26 The audit also considered whether:

- effective arrangements were in place to manage procurement risk; and
- suppliers were evaluated fairly, consistently and impartially in the procurement process.

Out of scope

1.27 The audit did not:

- review the Education Directorate's need, business case or decision to proceed with the procurement for the design and construction services;
- review or re-appraise the technical merits of the supplier bids; or
- examine procurement practices more broadly in the Education Directorate and/or Major Projects Canberra and the way the two agencies collaborate and cooperate in relation to procurement processes more broadly.

- 1.28 The audit also did not consider the management and implementation of the contract for building and construction services with Lendlease.

Audit criteria, approach and method

Audit criteria

- 1.29 To form a conclusion against the objective, the following criteria were used:
- **Criterion 1:** Was the procurement process for the Campbell Primary School Modernisation Project conducted in accordance with ACT Government procurement requirements?
 - **Criterion 2:** Were effective probity arrangements put in place and complied with for the Campbell Primary School Modernisation Project procurement process?

Audit approach and method

- 1.30 The audit approach and method consisted of:
- reviewing relevant ACT Government procurement rules and guidelines;
 - reviewing procurement policies and procedural guidance developed by Major Projects Canberra;
 - reviewing and documenting Major Projects Canberra and the Education Directorate's internal control environment as it relates to planning and executing the procurement process;
 - identifying and reviewing procurement documentation, including the arrangements put in place to ensure integrity and probity in the process;
 - interviews under oath or affirmation with relevant staff from the Education Directorate and Major Projects Canberra; and
 - reviewing relevant literature and/or reports on procurement and integrity and probity arrangements by other jurisdictions to identify better practice.
- 1.31 The audit was performed in accordance with *ASAE 3500 – Performance Engagements*. The audit adopted the policy and practice statements outlined in the Audit Office's *Performance Audit Methods and Practices (PAMPr)* which is designed to comply with the requirements of the *Auditor-General Act 1996* and *ASAE 3500 – Performance Engagements*.
- 1.32 In the conduct of this performance audit the ACT Audit Office complied with the independence and other relevant ethical requirements related to assurance engagements.

2 THE PROCUREMENT PROCESS

- 2.1 This chapter considers the conduct of the procurement, from the release of the Request for Expressions of Interest in July 2019, through to the identification of Lendlease as the preferred tenderer in late June 2020. The chapter has a particular focus on decision-making processes associated with the Best and Final Offer process and the decision to identify Lendlease as the preferred tenderer.

Summary

Conclusions

The procurement process for the Campbell Primary School Modernisation Project lacked probity. Tenderers were not dealt with fairly, impartially and consistently.

Manteena was identified as the preferred tenderer by two different tender evaluation teams at two key stages of the procurement process; the Request for Tender stage and the subsequent Best and Final Offer stage. Manteena received the highest scores against the weighted evaluation criteria and quoted a lower price for the services. Despite this Lendlease was awarded the contract for the services.

In June 2020 the Tender Evaluation Team prepared a Tender Evaluation Report that identified Manteena as the preferred tenderer. The Delegate disagreed with the Tender Evaluation Team's recommendation and instead recommended to the Director-General that Lendlease be identified as the preferred tenderer because they offered the 'best value for money'. In making this recommendation the Delegate noted that Lendlease outscored Manteena on three of the six weighted evaluation criteria (comprising 30 percent of the criteria) and asserted that these criteria 'are reliable long term indicators of a company's ability to deliver quality projects and government initiatives such as Secure Local Jobs'. The Delegate acknowledged that Manteena outscored Lendlease on the other three criteria, including the design solution submitted as part of the tender process, but that because intellectual property in the design submissions put forward by the tenderers vested in the Territory 'the best elements of each design can be used in the upcoming design development phase'.

In making the recommendation to the Director-General the Delegate effectively re-weighted and re-prioritised the evaluation criteria. Decision-making was not based on the evaluation criteria with which the Territory approached the market and sought tenders. Probity was not demonstrated in the procurement process to 'deal fairly, impartially and consistently with suppliers'.

Key findings

	Paragraph
<p>Manteena and Lendlease submitted tenders on time and in conformance with the requirements of the RFT. Manteena provided a total tender price of \$17,303,579 (GST ex) and Lendlease provided a total tender price of \$18,768,465 (GST ex). Manteena was over the Territory’s budgeted amount by 11.4 percent and Lendlease was over the budgeted amount by 20.8 percent. The members of the Tender Evaluation Team separately reviewed the tenders that were received, met to discuss their assessments of the tenders and prepared a draft Tender Evaluation Report. The draft Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers’ assessment against each criterion and a proposed recommendation. Manteena was given a total score of 79 and Lendlease was given a total score of 52. The draft Tender Evaluation Report recommended Manteena as the preferred tenderer and that the Tender Evaluation Team ‘be authorised to enter into contract negotiations ... [to] identify areas of de-scoping and cost savings, in conjunction with the TET, to bring the project within the target cost of the design and construction component of the project’. The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate), became apprised of the proposed outcome of the RFT process and indicated their disinclination to agree with the draft Tender Evaluation Report.</p>	2.44
<p>The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate), engaged in the procurement process prior to the Tender Evaluation Team having the opportunity to conclude its evaluation of the tenders and make a recommendation. This is not consistent with probity better practice or the <i>Tender Evaluation Plan</i> (July 2019) and this allowed the Delegate to influence the recommendation of the Tender Evaluation Team.</p>	2.51
<p>The draft Tender Evaluation Report recommended that a ‘value management process’ be entered into with Manteena. This is a process that can be used in circumstances where the tendered price exceeds the available budget. However, the Acting Executive Group Manager, Business Services Division (Education Directorate), as the delegate for the procurement, requested consideration of a Best and Final Offer (BAFO) process. The conduct of a BAFO process was inherently more beneficial to Lendlease than it was to Manteena, based on the Tender Evaluation Team’s assessment, as identified in the draft Tender Evaluation Report. Manteena had identified a lower tender price and had scored significantly higher against the evaluation criteria; there was much more potential for Lendlease to improve its tender, relative to Manteena. Legal advice was sought from the ACT Government Solicitor’s Office, which identified that the conduct of the BAFO process was permissible provided certain criteria and requirements were met.</p>	2.82
<p>The Tender Evaluation Team produced an amended and signed version of the draft Tender Evaluation Report (i.e. the first signed Tender Evaluation Report) on 18 March 2020. Similar to the draft Tender Evaluation Report, the first signed Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers’ assessment against each criterion and a proposed recommendation. The score and ranking of the two tenderers was the same as in the draft Tender</p>	2.94

Evaluation Report, but there were differences in the qualitative assessment of each tender proposal compared with the draft Tender Evaluation Report. The first signed Tender Evaluation Report was not signed or endorsed by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the delegate. The first Tender Evaluation Team was subsequently asked to re-evaluate the tenders, but at least one member of the Tender Evaluation Team identified that they did not wish to participate in a re-evaluation process and the first Tender Evaluation Team was disbanded.

On 27 March 2020 the Acting Executive Group Manager, Business Services Division (Education Directorate) agreed to the appointment of a second Tender Evaluation Team. Similar to the first Tender Evaluation Team, the second Tender Evaluation Team included representatives from both Major Projects Canberra as well as the Education Directorate. The second Tender Evaluation Team produced a Tender Evaluation Report, which was signed by the two members and the chair on 6 April 2020 respectively. Manteena was given a total score of 69.1 and Lendlease was given a total score of 68.4. The report identified that the two tenderers 'both presented strong technical proposals and were low risk for the Territory' and that 'the scores based on each submitted tender were too close to clearly recommend a preferred tenderer'. The report concluded a BAFO process be entered into. The second signed Tender Evaluation Report made the same recommendation as the first signed Tender Evaluation Report but the scores between the two tenderers were much narrower. The second signed Tender Evaluation Report was approved by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the Delegate on 8 April 2020. 2.107

In response to a request for a Best and Final Offer from the two tenderers, Manteena provided a revised tender price of \$15,100,000 (GST ex) and Lendlease provided a revised tender price of \$15,997,366 (GST ex). The tenderers were asked to revise their tenders against three of the six weighted criteria from the original RFT process, namely: WC3: a demonstration that the project will be completed within the contract period (20 percent); WC4: a clear understanding of the project (30 percent); and WC5: financial offer (20 percent). The scores for the remaining three criteria from the original RFT process were to remain. A third signed and final Tender Evaluation Report was prepared and signed by the second Tender Evaluation Team. The report gave Manteena a score of 76.1 and Lendlease a score of 67.4. The report stated 'Manteena have presented a strong and cost-efficient design proposal that provides best value for money, and the lowest risk profile' and sought approval to enter into a contract for Phase 1 of the project with Manteena. At the time the Acting Executive Group Manager, Business Services Division (Education Directorate) did not sign or endorse the third signed Tender Evaluation Report, but instead provided an Executive Brief to the Director-General of the Education Directorate that sought approval to enter into a contract for Phase 1 of the project with Lendlease. 2.141

The reasoning for the recommendation to the Director-General is embodied in four paragraphs in the Executive Brief. In making the alternative recommendation to the Director-General, the Acting Executive Group Manager, Business Services Division (Education Directorate) was seeking to over-rule the professional advice of the Tender Evaluation Team. It was therefore incumbent on the Acting Executive Group Manager, Business Services Division (Education Directorate) to adequately and 2.142

appropriately document their rationale and reasoning. This did not occur. There was inadequate documentation to support the recommendation to enter into a contract with Lendlease, as opposed to Manteena. A key factor in the decision was an expectation that the Directorate was assigned the Intellectual Property of the tenderers, in the form of the re-design of the buildings, so that the ‘best elements of each design can be used in the upcoming design development phase’. The Audit Office considers that the assignation of the Intellectual Property rights for the re-design of the school buildings from the unsuccessful tenderer was not a *fait accompli*, and the presumption that ‘the best elements of each design can be used in the upcoming design development phase’ was incorrect.

The Acting Executive Group Manager, Business Services Division (Education Directorate) produced a document in February 2021 that sought to provide further insight and explanation as to their recommendation to the Director-General to enter into a contract with Lendlease. The February 2021 document acknowledged that ‘Manteena outscored Lend Lease on the criteria directly influenced by their design’ but that Lendlease ‘had closed the pricing gap (based on the limited feedback they received as part of the BAFO) ... [and] in a design and construct contract, those design refinements could be continued by whichever company was in contract with the territory in a detailed design phase’. This is unfair. Such an assessment does not fairly value or reward the efforts of a tenderer and the merits of their tender. 2.152

The February 2021 document identified that the protracted procurement process for the Campbell Primary School Modernisation Project created risks for the delivery of the project and it asserted that Lendlease was in a stronger position to manage these risks due to ‘long term factors’. In doing so, the Acting Executive Group Manager, Business Services Division (Education Directorate) referred to their previous role as the Secure Local Jobs Code Registrar between November 2018 and January 2020, and how knowledge and understanding from this experience had influenced their consideration. The conduct and timing of the procurement process, including the decision to go to a BAFO process, was within the responsibility and control of the Territory; it is unfair to identify risks deriving from the protracted procurement process as a basis on which to penalise a tenderer that had consistently been identified as the preferred supplier throughout the process. The Acting Executive Group Manager, Business Services Division (Education Directorate) asserted that Lendlease was likely to perform better based on ‘long term factors’. In their response to the draft proposed report the Acting Executive Group Manager, Business Services Division (Education Directorate) advised that this assessment was based on the second Tender Evaluation Team’s assessment of the RFT responses and the scoring of ‘WC1 – past performance’ (Lendlease received a score of 8 and Manteena received a score of 7). 2.158

The *Tender Evaluation Plan* (July 2019) allowed for an ‘overall assessment of value for money’ and countenanced that the preferred tenderer might not be the ‘the tenderer with the highest score’. In doing so, however, the *Tender Evaluation Plan* (July 2019) required that ‘full justification for selection of another will be provided’. This did not occur at the time of the decision by the Director-General of the Education Directorate. Subsequently, in February 2021 and in June 2021 in an interview under oath or affirmation, the Acting Executive Group Manager, Business Services Division (Education Directorate) sought to provide a rationale as to why they 2.166

believed the tenderer with the higher price and lower score against the weighted evaluation criteria offered 'overall value for money'. In doing so they effectively re-weighted and re-prioritised the evaluation criteria with which the Territory approached the market and sought tenders. Probity was not demonstrated in the procurement process to 'deal fairly, impartially and consistently with suppliers', as provided for by *Procurement Policy Circular PC 21: Probity and Ethical Behaviour*.

Procurement planning

Procurement Plan Minute

2.2 In June 2019 a *Procurement Plan Minute* for the Campbell Primary School Modernisation Project was prepared. The *Procurement Plan Minute* sought:

... agreement to procure a pre-qualified Contractor to undertake the Design and Construction (D&C) of the modernisation of Campbell Primary School.

2.3 The *Procurement Plan Minute* (July 2019) was:

- signed by the members of a Tender Evaluation Team that had been identified for the procurement;
- endorsed by representatives of Major Projects Canberra including representatives of the Infrastructure Delivery Partners (Commercial Infrastructure Branch); and
- endorsed by representatives of the Education Directorate including representatives of the Infrastructure and Capital Works Branch.

2.4 The *Procurement Plan Minute* (July 2019) was approved by the Executive Group Manager, Business Services on 10 July 2019.

2.5 The *Procurement Plan Minute* (July 2019) identified inter alia:

- the scope of works to be provided through the procurement;
- an estimated value for the procurement of \$18.211 million (GST exclusive);
- the methodology to be followed for the procurement; and
- the timing of various stages associated with the procurement.

Scope of works

2.6 The *Procurement Plan Minute* (July 2019) identified the scope of works for the procurement as including:

... construction of new learning communities for 450 students (alternatively construction of a 300 student learning community and refurbishment of existing classrooms for 150 students (dependant on community consultation outcomes)), construction of amenities, canteen, STEM, Small Group Program facilities, replacement of roofs, access provisions and landscaping. Works also include refurbishment of the hall.

Estimated procurement value

2.7 The *Procurement Plan Minute* (July 2019) identified an estimated value for the procurement of \$18.211 million (GST exclusive). The estimated value of the procurement included project management and other ACT Government administrative costs. An amount of \$15.535 million (GST exclusive) was eventually identified for the design and construct component of the project, i.e. the services for which tenders were sought.

Procurement methodology

2.8 The *Procurement Plan Minute* (July 2019) identified the methodology for the procurement as a 'two stage procurement methodology'. The first stage was for an open Request for Expressions of Interest (REOI) from 'pre-qualified [Design and Construction] Contractors or Consortia to be shortlisted to tender for the project'.

2.9 The first stage was expected to identify up to three tenderers to proceed to the second stage, i.e. the Request for Tenders (RFT). The RFT stage was for the short-listed tenderers to 'submit a lump sum tender with design solution for the planned works'. The tenders were to be evaluated in order to identify a preferred tenderer and 'subject to Delegate approval, negotiations will then commence to: award a two phase GC21 [Design and Construct] contract for Phase 1'.

2.10 Phase 1 of the project was to involve the 'development of the contractor's tendered design to incorporate amendments requested by the Territory including associated cost adjustments to the tender sum' and Phase 2 was to involve the 'completion of design and construction of the project by the agreed completion date'.

Procurement timing

2.11 The *Procurement Plan Minute* (July 2019) identified the timing for the procurement, key aspects of which included:

- advertisement of REOI - early July 2019;
- advertisement of RFT - late July 2019;
- closure of RFT - November 2019;
- tender evaluation - October 2019;

- approval of Tender Evaluation Report - late November 2019; and
- negotiations and award of contract - December 2019.

Tender Evaluation Plan

2.12 Attached to the *Procurement Plan Minute* (July 2019) was a *Tender Evaluation Plan* and a *Procurement Risk Management Plan*. The *Tender Evaluation Plan* (July 2019) identified:

... the Tender Evaluation Team (TET) for the REOI and RFT and its responsibilities, the evaluation methodology and the evaluation criteria by which tenders received will be evaluated.

2.13 The *Tender Evaluation Plan* (July 2019) reaffirmed the process outlined in the *Procurement Plan Minute* (July 2019) and the general conditions in which the procurement was to be conducted:

The methodology for this procurement will be a publicly advertised REOI followed by a select RFT from the shortlisted candidates. The process will be undertaken in accordance with the Government Procurement Act, supporting regulation, the endorsed Procurement Plan Minute (PPM), the Request for Tender issued and the Standard Conditions of Tender.

Tender Evaluation Team

2.14 The *Procurement Plan Minute* (July 2019) and the *Tender Evaluation Plan* (July 2019) identified four members of the Tender Evaluation Team:

- a representative of Major Projects Canberra, from the Infrastructure Delivery Partners (Commercial Infrastructure Branch), as the Chair;
- two representatives from the Education Directorate, from the Infrastructure and Capital Works Branch; and
- a senior representative from the Infrastructure Delivery Partners (Commercial Infrastructure Branch), Major Projects Canberra, as an Observer.

2.15 The *Tender Evaluation Plan* (July 2019) identified that the Tender Evaluation Team would be responsible for:

- maintaining probity;
- evaluating the responses in accordance with the criteria and methodology;
- documenting the evaluation process;
- preparing an evaluation report;
- seeking Director-General or Delegate approval to commence post tender negotiations with the preferred tenderer;
- seeking Director-General or Delegate approval to proceed with a contract with the preferred respondent; and
- debriefing unsuccessful respondents.

2.16 The *Tender Evaluation Plan* (July 2019) does not refer to the role or responsibilities of the Delegate or any other participants in the process, e.g. senior managers and executives in either Major Projects Canberra or the Education Directorate.

Tender evaluation process

2.17 The *Tender Evaluation Plan* (July 2019) describes a four-step evaluation process:

- Stage 1 - a conformity check including an assessment against threshold criteria;
- Stage 2 - an assessment against weighted evaluation criteria;
- Stage 3 - an assessment against non-weighted evaluation criteria; and
- Stage 4 – an overall assessment of Value for Money.

2.18 The *Tender Evaluation Plan* (July 2019) identifies separate evaluation criteria (and their weighting) that is to be applied at the REOI and RFT stages of the procurement. These are discussed as relevant in the following sections of the report.

Request for Expressions of Interest

Issue of the Request for Expressions of Interest

2.19 The REOI was published on the Tenders ACT website on 30 July 2019, with a closing date of 27 August 2019.

2.20 The REOI identified the evaluation criteria against which the expressions of interest were to be assessed. The evaluation criteria identified as part of the REOI was the same as the evaluation criteria identified in the *Tender Evaluation Plan* (July 2019). A summary of the evaluation criteria is shown in Table 2-1.

Table 2-1 Summary of evaluation criteria – Request for Expressions of Interest

Threshold Criteria	
TC1	<p>Prequalification</p> <p>The respondent must be prequalified with the ACT to the required level and maintain the prequalification throughout the entire process.</p>
TC2	<p>Industrial Relations and Regional Contribution</p> <ul style="list-style-type: none"> - Part A. Secure Local Jobs Code Certificate – the respondent must hold a Secure Local Jobs Code Certificate. - Part B. Labour Relations, Training and Workplace Equity Plan – the respondent must submit a Labour Relations, Training and Workplace Equity Plan with its response. - Part C. Ethical Suppliers Declaration – Tender – the respondent must submit an Ethical Suppliers Declaration.
Non-weighted assessment criteria	

Threshold Criteria		
NWC1	Financial Capacity Assessment Through this criterion the Territory retained the option to assess a respondent's financial status and capacity to provide the services.	
Weighted Assessment Criteria		
WC1	Past Performance Interested parties were to provide and describe 'past performance on completed similar projects in the past 5 years' and 'demonstrate experience with projects performed under similar contract forms and project delivery methodology'.	20%
WC2	Technical, Managerial Skills, and Resources to complete the project Interested parties were to provide and describe their proposed management structure and personnel for the project, including professional/technical capability and availability of key personnel.	20%
WC3	A clear understanding of the specification, associated contract documents, form of contract and delivery methodology Interested parties were to provide and describe a range of information that demonstrated inter alia an understanding of the project and its requirements, an ability to manage and undertake effective communication with stakeholders and achieve value for money outcomes on the project.	20%
WC4	Demonstrated Work Health and Safety system to complete the project Interested parties were to provide evidence of inter alia 'an AS/ISO/OFSC accredited system to proactively manage the Work Health and Safety (WHS) requirements of the project' and 'that nominated personnel have experience in implementation of a WHS site management system'.	30%
WC5	Industrial Relations and regional contribution <ul style="list-style-type: none"> - A. Secure Local Jobs Code – Interested parties were to 'complete and submit an preliminary applicable Labour Relations, Training and Workplace Equity Plan' and the Territory was to 'assess the extent to which the Respondent has demonstrated that it will ensure capable local businesses are given full, fair and reasonable opportunity to participate in the provision of the Works during the term of the proposed contract'. - B. Local Industry Participation – Interested parties were to 'complete and submit a Local Industry Participation Plan (LIPP)' and the Territory was to 'assess the extent to which the Respondent has demonstrated that it will ensure capable local businesses are given full, fair and reasonable opportunity to participate in the provision of the Works during the term of the proposed contract'. 	10%

Source: *Request for Expressions of Interest* (July 2019).

2.21 Six suppliers submitted a response by the closing date of 27 August 2019.

Evaluation of expressions of interest

2.22 The responses to the REOI were evaluated in accordance with the *Tender Evaluation Plan* (July 2019).

2.23 An REOI Evaluation Report was completed by the Tender Evaluation Team in early October 2019. The members of the Tender Evaluation Team signed the report between 3 October 2019 and 9 October 2019.

2.24 The REOI Evaluation Report provided a summary of assessment against each of the six respondents and provided a total evaluation score and ranking for each of the respondents. The REOI Evaluation Report concluded:

The evaluation confirms that the highest ranking responses from Manteena and Lendlease demonstrated the most suitable level of capability, expertise and capacity necessary to design and construct the Project. Both respondents provided the least risk to the Territory and demonstrated relevant experience working on past or current Education projects.

2.25 The REOI Evaluation Report recommended:

... both [Manteena] and [Lendlease] be shortlisted to tender for Stage 2 of the procurement process (RFT) for the Campbell Primary School Modernisation project.

At the conclusion of Stage 2, the Tender Evaluation Team will provide a further recommendation to the Delegate recommending acceptance of a Tender submitted by one of the two Tenderers shortlisted.

2.26 The REOI Evaluation Report was endorsed by the Executive Branch Manager, Infrastructure and Capital Works Branch (Education Directorate) on 14 October 2019 and approved by the Acting Executive Group Manager, Business Services Division (Education Directorate) on 15 October 2019.

Request for Tender

Issue of the Request for Tender

2.27 The RFT was issued to Manteena and Lendlease on 30 October 2019. Tenders were due by 23 January 2020.

2.28 The RFT identified the evaluation criteria against which the tenders were to be assessed. The evaluation criteria identified as part of the RFT were the same as the evaluation criteria identified in the *Tender Evaluation Plan* (July 2019). (The non-weighted criterion 'Financial Capacity Assessment', which was identified in the *Tender Evaluation Plan* (July 2019) as applying at both the REOI and RFT stages of the procurement, was not used in the RFT as it had been previously evaluated as part of the REOI). A summary of the RFT evaluation criteria is shown in Table 2-2.

Table 2-2 Summary of evaluation criteria – Request for Tender

Threshold Criteria	
TC1	<p>Prequalification</p> <p>The respondent must be prequalified with the ACT to the required level and maintain the prequalification throughout the entire process.</p>
TC2	<p>Industrial Relations and Regional Contribution</p>

Threshold Criteria		
	<ul style="list-style-type: none"> - Part A. Secure Local Jobs Code Certificate – the respondent must hold a Secure Local Jobs Code Certificate. - Part B. Labour Relations, Training and Workplace Equity Plan – the respondent must submit a Labour Relations, Training and Workplace Equity Plan with its response. - Part C. Ethical Suppliers Declaration – Tender – the respondent must submit an Ethical Suppliers Declaration. 	
Weighted Assessment Criteria		
WC1	<p>Past Response</p> <p>The Tenderer was to confirm or update the information provided in the REOI in relation to the project team and the other Technical, Managerial Skills and Resources as well as any changes to the demonstrated Work Health and Safety system identified in the REOI.</p>	10%
WC2	<p>Technical, Managerial Skills, and Resources to complete the project</p> <p>The Tenderer was to confirm or update the information provided in the REOI in relation to the proposed management structure and personnel for the project, including professional/technical capability and availability of key personnel.</p>	10%
WC3	<p>A demonstration that the project will be completed within the contract period</p> <p>The Tenderer was to provide and describe a program for the project to complete the works within the contract period, critical activities and methods of achieving project milestones and completion dates, and demonstrate a clear understanding of the specific staging of construction, approvals, utilities services and traffic management.</p>	20%
WC4	<p>A clear understanding of the project</p> <p>The Tenderer was to ‘provide sufficient information for the ACT Government to evaluate the designs for the school’. This included proposing a design solution, design documentation, design management processes including Quality Assurance for the design methodology, planning framework, construction staging, engineering structures and services, innovation, functional and operational efficiency, flexibility and adaptability, design departures and the quality of equipment, fittings and finishes.</p>	30%
WC5	<p>Financial Offer</p> <p>The Tenderer was to ‘provide the completed Tender Schedule with the Tenderer’s financial offer’.</p> <p>Through this criterion the Territory was to ‘evaluate the extent to which the Tenderer has demonstrated that its’ proposed pricing, when considered in conjunction with all other Assessment Criteria and other information taken into account (including risk), constitutes value for money Includes an assessment of risk and value for money’.</p>	20%
WC6	<p>Industrial Relations and regional contribution</p> <ul style="list-style-type: none"> - A. Secure Local Jobs Code – Tenderers were to ‘complete and submit an preliminary applicable Labour Relations, Training and Workplace Equity Plan’ and the Territory was to ‘assess the extent to which the Respondent has demonstrated that it will ensure capable local businesses are given full, fair and reasonable opportunity to participate in the provision of the Works during the term of the proposed contract’. 	10%

Threshold Criteria		
	<ul style="list-style-type: none"> - B. Local Industry Participation – Tenderers were to ‘complete and submit a Local Industry Participation Plan (LIPP)’ and the Territory was to ‘assess the extent to which the Respondent has demonstrated that it will ensure capable local businesses are given full, fair and reasonable opportunity to participate in the provision of the Works during the term of the proposed contract’. 	

Source: Request for Tender (October 2019).

2.29 As part of the RFT process, Early Contractor Involvement sessions were offered to the tenderers that allowed them to discuss their concept design in order to further develop their submissions based on feedback provided by the tender evaluation team.

Tenderer responses

2.30 Manteena and Lendlease submitted their tenders on time and in conformance with the requirements of the RFT.

2.31 Manteena provided a total tender price of \$17,303,579 (GST exclusive) and Lendlease provided a total tender price of \$18,768,465 (GST exclusive). Table 2-3 shows the tender price for the two tenders, broken down by each of the phases.

Table 2-3 RFT tender prices

Tenderer	Phase 1 tender price \$ (GST ex)	Phase 2 tender price \$ (GST ex)	Total tender price \$ (GST ex)
Manteena	594,884	16,708,695	17,303,579
Lendlease	535,080	18,233,385	18,768,465

Source: Draft Tender Evaluation Report (February 2020) (Major Projects Canberra).

2.32 Both tenders were over the budgeted amount of \$15,535,200 (GST exclusive) for the design and construction component of the project. Manteena was over the budgeted amount by 11.4 percent and Lendlease was over the budgeted amount by 20.8 percent.

2.33 The magnitude of Lendlease’s tendered price was not immediately recognised by the Tender Evaluation Team and other participants. Various documentation was subsequently produced and circulated that consistently identified the tenderers’ being 11 percent and 17 percent over the Territory’s budgeted amount. This had the effect of misrepresenting the magnitude of the extent to which Lendlease’s tendered price exceeded that of Manteena and the budget.

Initial evaluation of RFT

2.34 The Tender Evaluation Team undertook an evaluation of the tenders received on 23 January 2020. The members of the Tender Evaluation Team separately reviewed the tenders that were received, met to discuss their assessments of the tenders and commenced the preparation of a draft Tender Evaluation Report.

Draft Tender Evaluation Report

2.35 The Tender Evaluation Team assessed Manteena and Lendlease against the evaluation criteria identified in the RFT. A draft Tender Evaluation Report was produced and shared between members of the Tender Evaluation Team. The draft Tender Evaluation Report included scores against each of the criteria, a brief description of the assessment of the tenderers against each criterion and a proposed recommendation.

2.36 Table 2-4 shows a summary of the results of the draft Tender Evaluation Report.

Table 2-4 Draft Tender Evaluation Report scoring

Tenderer	Total Score	Ranking
Manteena	79	1
Lendlease	52	2

Source: Draft Tender Evaluation Report (February 2020) (Major Projects Canberra).

2.37 The draft Tender Evaluation Report identified Manteena as the preferred tenderer by a significant margin.

2.38 The draft Tender Evaluation Report concluded:

The TET considered both tenderers provided good responses and understood the project with some exceptions as noted above. In evaluation the weighted criteria scores, referee reports and quality of the tender submissions provided, the TET concluded that Manteena demonstrated the best value for money, most suitable level of capability, expertise and capacity necessary to design and construct the project.

2.39 The draft Tender Evaluation Report also stated:

The TET recommend Manteena as the preferred tenderer so as to enter into negotiations for cost savings to align the tendered amount with the targeted budget.

2.40 The draft Tender Evaluation Report made the following recommendation:

The Tender Evaluation Team (TET) recommends that Manteena Commercial Pty Ltd be nominated as the preferred Tenderer, and that the TET be authorized to enter into contract negotiations on the following basis: that Manteena Commercial Pty Ltd identify areas of de-scoping and cost savings, in conjunction with the TET, to bring the project within the target cost of the design and construction component of the project.

Delegate disagreement

2.41 The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate), became apprised of the proposed outcome of the RFT process and indicated their disinclination to agree with the draft Tender Evaluation Report.

2.42 In an interview under oath or affirmation the Acting Executive Group Manager, Business Services Division (Education Directorate) advised that they did not agree with the recommendation of the Tender Evaluation Team as outlined in the draft Tender Evaluation Report:

... neither tender in my view was capable of being accepted as they were, because neither of them actually met the full set of [what's] required for the Government in terms of budget, outcomes, and the build form and stuff that we wanted. So ... in my mind, this is almost the point where you've got a failed tender process where you're coming out for two results, neither which can be accepted as they are at that point there.

2.43 The Acting Executive Group Manager, Business Services Division (Education Directorate) further advised:

... the outcome is, in this case, [we] got two tenders neither which we could accept ...

2.44 Manteena and Lendlease submitted tenders on time and in conformance with the requirements of the RFT. Manteena provided a total tender price of \$17,303,579 (GST ex) and Lendlease provided a total tender price of \$18,768,465 (GST ex). Manteena was over the Territory's budgeted amount by 11.4 percent and Lendlease was over the budgeted amount by 20.8 percent. The members of the Tender Evaluation Team separately reviewed the tenders that were received, met to discuss their assessments of the tenders and prepared a draft Tender Evaluation Report. The draft Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers' assessment against each criterion and a proposed recommendation. Manteena was given a total score of 79 and Lendlease was given a total score of 52. The draft Tender Evaluation Report recommended Manteena as the preferred tenderer and that the Tender Evaluation Team 'be authorised to enter into contract negotiations ... [to] identify areas of de-scoping and cost savings, in conjunction with the TET, to bring the project within the target cost of the design and construction component of the project'. The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate), became apprised of the proposed outcome of the RFT process and indicated their disinclination to agree with the draft Tender Evaluation Report.

Delegate's imposition in decision-making process

2.45 The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate), engaged in the procurement process prior to the Tender Evaluation Team having the opportunity to conclude its evaluation of the tenders and make a recommendation. This is not consistent with probity better practice or the *Tender Evaluation Plan* (July 2019), which identifies and extensively discusses the role of the Tender Evaluation Team in evaluating tenders and making a recommendation to the Delegate for a decision, for example:

Once a preferred tenderer has been identified Delegate approval must be sought prior to any post tender negotiations which will take place prior to entering into a Contract.

2.46 The circumstances in which the Acting Executive Group Manager, Business Services Division (Education Directorate) became apprised of the Tender Evaluation Team's preference to

recommend Manteena as the preferred supplier is not clear. It is apparent, however, that there was a practice of sharing draft tender evaluation reports with senior officers and representatives in both Major Projects Canberra and the Education Directorate. In its response to the draft proposed report Major Projects Canberra identified that the practice of sharing draft tender evaluation reports with senior officers in Major Projects Canberra was contemplated by the *Tender Evaluation Plan* (July 2019). This is discussed in further detail in paragraphs 3.33 to 3.42.

2.47 In an interview under oath or affirmation the chair of the Tender Evaluation Team advised that they did not provide the draft Tender Evaluation Report to the Acting Executive Group Manager, Business Services Division (Education Directorate), nor did they know how the report came to be provided to them.

2.48 The chair of the Tender Evaluation Team advised that the draft Tender Evaluation Report had been 'reviewed by my Manager and Director, which is our usual process'. The chair also advised that they provided the draft Tender Evaluation Report to the other members of the Tender Evaluation Team along with potential variations and exclusions to the scope of works to bring the project within budget:

I'd sent out a list of potential things that could be value managed out to try and get under budget, I sent it to them, the [other Tender Evaluation Team members]. They had already reviewed the report with the recommendation that I'd sent over as a draft.

2.49 In an interview under oath or affirmation the Acting Executive Group Manager, Business Services Division (Education Directorate) advised that the prevailing practice was for draft tender evaluation reports to 'typically ... come up via the hierarchy of the organisation'. The Acting Executive Group Manager, Business Services Division (Education Directorate) advised:

... the Tender Evaluation Team would write a report at the end of their deliberations on that. Now that draft report is then discussed and ... would then generally go to a bunch of people higher in the hierarchy than all those people for discussions.

2.50 The Acting Executive Group Manager, Business Services Division (Education Directorate) advised:

I think that my first encounter with that draft report, was probably a meeting with the [Education Directorate] members of the Evaluation Team ... Now also say [Design Delivery Director, Major Projects Canberra, I think, was in those conversations around or that was there, and then they would present where they got to with that evaluation, knowing it's a draft evaluation and had that conversation around where that goes to there.

2.51 The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate), engaged in the procurement process prior to the Tender Evaluation Team having the opportunity to conclude its evaluation of the tenders and make a recommendation. This is not consistent with probity better practice or the *Tender Evaluation Plan* (July 2019) and this allowed the Delegate to influence the recommendation of the Tender Evaluation Team.

Proposal of a Best and Final Offer process

Value management process

- 2.52 Where an RFT is issued, a preferred supplier is identified and the tendered price is above budget, a typical process that follows is a 'value management process'. A 'value management process' to alter the project scope and identify cost savings was recommended by the Tender Evaluation Team in the draft Tender Evaluation Report.
- 2.53 A 'value management process' is described as an opportunity for the Territory to discuss the preferred tenderer's proposal with them to identify opportunities to amend the scope of works to reduce the tendered price. Participants in the procurement process described their familiarity with the 'value management process' and its use under these circumstances.
- 2.54 Another possibility is that the Territory identifies additional funding to meet the tendered price of the preferred tenderer. In their response to the draft proposed report the chair of the first Tender Evaluation Team noted that they advised the Education Directorate members of the first Tender Evaluation Team on 23 March 2020 that an option for additional funding for the procurement was through sourcing COVID-19 economic stimulus funding for infrastructure on education projects. They advised of the possibility to both '[value manage] and seek additional funding'. In its response to the draft proposed report the Education Directorate advised that 'additional funds were discussed but were unavailable'.
- 2.55 Some participants in the process thought that a 'value management process' would, as per usual processes, be the most effective way of coming to an agreement with the preferred tenderer within the budgeted parameters of the project. In an interview under oath or affirmation the Design Delivery Director (Major Projects Canberra) advised:
- ... certainly I would have been recommending that, if I was there that you identify your preferred tenderer, and then embark on a value management process, which would basically be a negotiation with that tenderer to say, "right, this is how much we're looking to save on the project. Now, by working together, where can we identify items that we've asked for in the tender that you believe, well and equally on our side, you know, the Government side were less essential than other aspects".
- 2.56 In response to questioning under oath or affirmation as to whether a 'value management process' was a possibility, the Acting Executive Group Manager, Business Services Division (Education Directorate) discussed the extent to which the tenderers' prices were over the budget was a factor in their consideration:
- 10% is, in my view, though, much higher than when you're trying to get 4 or 5% back or 1 to 2% back, or something to get back there, that's a more normal number. 10% is an awful lot of money to go after value management process and essentially take a big chunk out of someone's design and come up with a whole new way of doing it at that point there.

Identification of a Best and Final Offer process

- 2.57 A Best and Final Offer (BAFO) process typically seeks information from two or more tenderers to identify if there is any potential for a reduction in their tendered prices. For the Campbell Primary School Modernisation Project, the Territory identified opportunities for cost savings, by identifying aspects of the project scope that could be removed, against which the two preferred tenders were asked to respond. It is apparent that the option of a BAFO process was suggested by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the delegate for the procurement.
- 2.58 In an interview under oath or affirmation the Executive Branch Manager, Commercial Infrastructure (Major Projects Canberra) advised the request for a BAFO process:
- ... came from the partner Directorate as a request because they were seeking best value for money from the financial offer aligning with the design requirements for the school.
- 2.59 The option of a BAFO process was discussed at a meeting on 28 February 2020 to discuss the conduct of the procurement process. Present at the meeting were:
- the Acting Executive Group Manager, Business Services Division (Education Directorate);
 - the Senior Project Manager, Commercial Infrastructure Branch, Infrastructure Delivery Partners (Major Projects Canberra);
 - the Design Delivery Director, Commercial Infrastructure Branch, Infrastructure Delivery Partners (Major Projects Canberra);
 - the Executive Branch Manager, Commercial Infrastructure Branch, Infrastructure Delivery Partners (Major Projects Canberra);
 - the Senior Director, Major Projects Section, Infrastructure and Capital Works Branch, Education Directorate; and
 - Assistant Director, Major Projects Section, Infrastructure and Capital Works Branch, Education Directorate.
- 2.60 In an interview under oath or affirmation the chair of the first Tender Evaluation Team advised their understanding of the purpose of the meeting was to discuss the Tender Evaluation Team's assessment results and likely recommendation that Manteena be identified as the preferred tenderer:
- I had actually expected that we were talking ... that we were going to be discussing where Education were going to go and find either one of two things, where Education were going to go and find some more money so that we could go ahead with this procurement or if they were going to be able to ... if they were going to agree that we could go into a value management process negotiation with a ... recommended tenderer.
- 2.61 At that meeting, the Acting Executive Group Manager, Business Services Division (Education Directorate) raised the option of a Best and Final Offer process.

- 2.62 In an interview under oath or affirmation the chair of the first Tender Evaluation Team advised:

... I walked into this meeting thinking that's what we were going to be discussing about where to find other funding or how we were going to go forward, like if they were going to look at a value management process, which is not unusual we've done it on projects before. Anyway, what actually came of it ... out of it was [the delegate] wanted to go to a dual negotiation.

- 2.63 In interviews under oath or affirmation members of the Tender Evaluation Team and other participants in the process identified that they had never experienced a BAFO process and that it was not a process that they were familiar with.

- 2.64 Notwithstanding that the BAFO process was not envisaged in the *Tender Evaluation Plan* (July 2019) or was a process that was usually followed, some participants in the process did not disagree with the decision to proceed to a BAFO process. In an interview under oath or affirmation the Executive Branch Manager, Commercial Infrastructure (Major Projects Canberra) advised:

Whether or not I deemed it to be necessary at the time ... I don't think I was either supportive or unsupportive of the BAFO. It was a request made, it was like, I can see the value in that request, I can see the challenges in that request. On balance, did I support it in the sense did I concur that it was okay to go and proceed with that process? I agreed to the process. I think supportive would be a word that would be too judgmental to necessarily apply. ... I neither agreed or disagreed with it. It was reasonable.

- 2.65 In an interview under oath or affirmation, the Acting Executive Branch Manager, Infrastructure and Capital Works (Education Directorate) advised that they did not have any concerns with respect to proceeding with a BAFO process.

- 2.66 In an interview under oath or affirmation, a member of the first Tender Evaluation Team advised:

Not really my place to say whether I was supportive or not. I could understand the requirements of why they wanted to go to a BAFO but based on other project experience, I also could see that there's opportunities to negotiate. I'm not too sure if the Delegate felt that those negotiations were of too higher values not to give an equal go for both tenderers to have another go. So ... it's neither here nor there for me.

Possibility for a re-tender

- 2.67 In an interview under oath or affirmation the Acting Executive Group Manager, Business Services Division (Education Directorate) advised that their preference was to re-tender for the procurement:

My preferred option was to actually re-tender it to both, like full re-tender not BAFO ...

- 2.68 If this was the case, there is no evidence that this was seriously considered or pursued as an option. It is apparent that an outcome of the 28 February 2020 meeting was a desire to seek legal advice on the feasibility of proceeding to a BAFO process.

- 2.69 In response to the draft proposed report the Acting Executive Group Manager, Business Services Division (Education Directorate) advised:

In this comment, I'm describing my initial thoughts, which I discussed with [Major Projects Canberra] and [Education Directorate] officers in advance of the meeting of 28 February and based on their advice, my preference had changed by the meeting date.

Legal advice in relation to a Best and Final Offer process

- 2.70 The *Procurement Plan Minute* (2019) and the *Tender Evaluation Plan* (2019) did not explicitly refer to the suppliers engaging in a potential BAFO process or detail the circumstances whereby a BAFO process should be considered. The RFT documentation did, however, allow for the possibility of a BAFO process.

- 2.71 It was decided that legal advice would need to be sought in relation to the possibility for a BAFO process. In an interview under oath or affirmation the chair of the first Tender Evaluation Team advised that the need to seek legal advice on the BAFO process was recognised during the meeting on 28 February 2020:

I think either my manager or maybe it was [Executive Branch Manager, Commercial Infrastructure (Major Projects Canberra)] ... I think, one of those two said "Well, we'll have to go to the Government Solicitors" and yeah, [the delegate] agreed, "Yes, you do have to go the Government Solicitor's Office". ... So then walked out of that meeting got things in train to go and get approval to go to the Government Solicitor's Office, so I went to the Government Solicitor's Office, because that had to be approved internally, and forms signed, and applications put in place. Went to the Government's Solicitor's Office a couple of days later, basically asking them, can we go to a BAFO, Best and Final Offer?

- 2.72 Following the meeting of 28 February 2020, the chair of the first Tender Evaluation Team sought advice from the ACT Government Solicitor's Office on 5 March 2020 as to the possibility of conducting a BAFO process.

- 2.73 The ACT Government Solicitor's Office provided advice to the chair of the first Tender Evaluation Team on 12 March 2020. In its advice, the ACT Government Solicitor's Office identified the 'facts as we understand them' and in doing so noted inter alia:

3) Both Tenderers submitted Tenders on time and in conformance with the requirements of the RFT.

4) Following evaluation of the Tenders it was found that both Tenderers were over the Directorate's budget by 11-17%.

5) In addition, both Tenders were deficient in one or more ways in the view of the evaluation team.

6) In order to endeavour to meet the Directorate's budget, the Delegate has requested both Tenders be approached with an opportunity to respond to a revised scope of the project, including being notified of the Directorate's budget.

- 2.74 In seeking advice from the ACT Government Solicitor's Office, documentation was provided to support consideration of whether a BAFO process could be undertaken. Reference to these documents is provided in the advice provided by the ACT Government Solicitor's Office to Major Projects Canberra. This includes the Request for Tender documentation (including the Standard Conditions of Tender – Construction, Addenda 1 through to 6 to the

Request for Tender), the *Tender Evaluation Plan* (July 2019), the *Procurement Plan Minute* (July 2019) and a draft BAFO request itself.

- 2.75 The first Tender Evaluation Team’s draft Tender Evaluation Report, which identified the scores that were allocated to the tenders, was not provided to the ACT Government Solicitor’s Office nor was the correct calculation of the magnitude that Lendlease was over the budget correctly conveyed.
- 2.76 In its response to the proposed draft report, Major Projects Canberra noted that the ACT Government Solicitor’s Office did not request the draft Tender Evaluation Report or scores from the tender evaluation process.
- 2.77 The ACT Government Solicitor’s Office provided advice to the chair of the first Tender Evaluation Team on 12 March 2020. The advice confirmed there was scope to carry out a BAFO process:

The RFT does not refer to BAFOs. However, section 29.4 of the Standard Conditions includes provision for BAFO processes. Section 29.4.1 relevantly provides:

“If a single preferred Tenderer cannot be identified, but the Territory believes a value for money solution can still be achieved, the Territory reserves the right to use a BAFO process. This might be used if, for example:

- (1) costs submitted by all Tenderers are unacceptably high;
- (2) a preferred tenderer cannot be clearly determined based on the evaluation of the responses against the Assessment Criteria in this RFT;
- (c) all Tenders are unacceptably deficient in one or more areas; or
- (d) it becomes evident that the RFT contained a mistake or area of uncertainty which has resulted in one or more Tenders not meeting the Territory’s requirements”.

- 2.78 In relation to the potential for a BAFO process, the ACT Government Solicitor’s Office noted:

We are instructed that:

- (1) both Tenderers submitted Tenders with pricing that is significantly higher than the Directorate’s budget;
- (2) both the Tenderers had some deficiencies in their Tender responses; and
- (3) in order to obtain a value for money outcome, the Territory is of the view that a reduced scope may allow for Tenderers to provide responses within budget.

- 2.79 The ACT Government Solicitor’s Office noted the RFT ‘allows the Territory to undertake a BAFO in these circumstances’ but importantly, the ACT Government Solicitor’s Office advice states that:

... first the tender evaluation team will need to be satisfied in relation to section 29.4.2 of the Standard Conditions of Tender, which states:

“Only Tenderers who the Territory believes capable of delivering the desired results, based on their submitted Tender including the results of assessment against the Assessment Criteria, may be invited to participate in the BAFO, if one is held.”

2.80 In this regard the ACT Government Solicitor's Office noted:

We are instructed that following a complete assessment of both Tenderers the Tender Evaluation Team was able to differentiate to an extent between the two which was the better offer. However, we are of the understanding that both Tenderers, with an opportunity to revise some of their design aspects of their responses, and in light of the revised scope, are assessed as capable of delivering the desired results.

...

Given that only two Tenderers were shortlisted to participate in the RFT process, and having regard to the fact that the Territory requires a not insignificant reduction in the scope of works in order to meet budget, it would appear that either Tenderer remains capable of being found suitable following the BAFO, and as such it would be prudent to give each the opportunity to revise their Tenders as part of a BAFO. However, this assessment is ultimately a matter for the tender evaluation team.

2.81 The conduct of a BAFO process was inherently more beneficial to Lendlease than it was to Manteena, based on the Tender Evaluation Team's assessment, as identified in the draft Tender Evaluation Report. Manteena had identified a lower tender price and had scored significantly higher against the evaluation criteria. There was much more potential for Lendlease to improve its bid, relative to Manteena. In requesting legal advice from the ACT Government Solicitor's Office, incorrect information was conveyed as to the magnitude of difference between the tendered prices and the magnitude of difference between the scores of the tenders was not accurately conveyed.

2.82 The draft Tender Evaluation Report recommended that a 'value management process' be entered into with Manteena. This is a process that can be used in circumstances where the tendered price exceeds the available budget. However, the Acting Executive Group Manager, Business Services Division (Education Directorate), as the delegate for the procurement, requested consideration of a Best and Final Offer (BAFO) process. The conduct of a BAFO process was inherently more beneficial to Lendlease than it was to Manteena, based on the Tender Evaluation Team's assessment, as identified in the draft Tender Evaluation Report. Manteena had identified a lower tender price and had scored significantly higher against the evaluation criteria; there was much more potential for Lendlease to improve its tender, relative to Manteena. Legal advice was sought from the ACT Government Solicitor's Office, which identified that the conduct of the BAFO process was permissible provided certain criteria and requirements were met.

First Signed Tender Evaluation Report (March 2020) (signed but not endorsed)

2.83 The Tender Evaluation Team produced an amended version of the draft Tender Evaluation Report on 18 March 2020. The first signed Tender Evaluation Report was signed by the Chair on 16 March and the two team members on 17 March 2020.

2.84 Similar to the draft Tender Evaluation Report, the first signed Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers' assessment against each criterion and a proposed recommendation. The score and ranking of the two tenderers was the same as in the draft Tender Evaluation Report, as shown in Table 2-4.

2.85 While the scores remained identical, there are differences in the qualitative assessment of each tender proposal in the first signed Tender Evaluation Report when compared with the draft Tender Evaluation Report.

2.86 The first signed Tender Evaluation Report concluded:

Following evaluation of both tenders the TET considered both tenderers provided conforming responses and understood the project with some exceptions ...

However, both tenderers costs submitted were assessed as being unacceptably high over the available funding.

Based on both tenders being unacceptably high over the available funding and following advice from the delegate and Government Solicitor's Office ... the option of a Best and Final Offer is available for consideration by the delegate. The Government Solicitor has advised that the advice to tenderers is required to be the same so that both tenderers are provided an equal opportunity with no unfair advantage or disadvantage. The items for possible scope adjustment are outlined at Attachment K and are based on the advice from the Government Solicitor at item 21 and any further GSO advice. It includes features that the Territory is prepared to remove from scope as well as other cost reductions identified by the tenderer.

2.87 The first signed Tender Evaluation Report recommended:

... that a Best and Final Offer be requested of both tenderers, based on the items listed in Attachment K, inclusive of potential scope removal and further cost savings identified by the tenderer to bring the project within the target cost for the design and construction of the project and thus giving the highest potential to achieve best value for money for the Territory.

2.88 The first signed Tender Evaluation Report was not signed or endorsed by the Acting Executive Group Manager, Business Services Division (Education Directorate). In its response to the draft proposed report, the Education Directorate advised that at the time the first signed Tender Evaluation Report was provided there were further conversations around the composition of the Tender Evaluation Team and how the BAFO would be conducted. The Education Directorate advised that the first Tender Evaluation Team was disbanded on 27 March 2020 therefore eliminating the need for further reconsideration of the first signed Tender Evaluation Report.

2.89 In an interview under oath or affirmation the chair of the first Tender Evaluation Team advised that they received advice from their supervisor 'that they wanted the Tender to be re-evaluated'. In response, the chair of the Tender Evaluation Team further advised 'I said I can't possibly do that, so I quit from the Chair'.

2.90 In an interview under oath or affirmation the Acting Executive Group Manager, Business Services Division (Education Directorate) acknowledged:

... some of this team did not want to be involved in the BAFO.

So, they felt that they had done an evaluation already and they'd reached what they thought was an outcome, and they didn't want to do a second one and that was a conversation that was had around that.

2.91 In response to the draft proposed report the Acting Executive Group Manager, Business Services Division (Education Directorate) advised 'the first [Tender Evaluation Team] was

going to be asked to evaluate the BAFO, not to re-evaluate the tender but this is not accurately conveyed in the report’.

2.92 In response to the final proposed report, the chair of the Tender Evaluation Team advised:

I didn’t agree with the justification of going to a BAFO, however I recognised that the [Tender Evaluation Report] is just a recommendation and the delegate has the ability to not agree with the [Tender Evaluation Report] recommendation. What I objected to was being asked to re-evaluate tenders I had already evaluated, i.e. the original submission. I felt that there was pressure to come up with different scoring than we had already produced – otherwise why would a re-evaluation of the original submission be required? It was the request to re-evaluate (the original submission – as that is all we had at that time) that I said I wouldn’t do. This is why I quit as chair.

2.93 On 27 March 2020 the first Tender Evaluation Team was disbanded and a second Tender Evaluation Team was installed.

2.94 The Tender Evaluation Team produced an amended and signed version of the draft Tender Evaluation Report (i.e. the first signed Tender Evaluation Report) on 18 March 2020. Similar to the draft Tender Evaluation Report, the first signed Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers’ assessment against each criterion and a proposed recommendation. The score and ranking of the two tenderers was the same as in the draft Tender Evaluation Report, but there were differences in the qualitative assessment of each tender proposal compared with the draft Tender Evaluation Report. The first signed Tender Evaluation Report was not signed or endorsed by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the delegate. The first Tender Evaluation Team was subsequently asked to re-evaluate the tenders, but at least one member of the Tender Evaluation Team identified that they did not wish to participate in a re-evaluation process and the first Tender Evaluation Team was disbanded.

Appointment of second Tender Evaluation Team

2.95 On 27 March 2020 the Acting Executive Group Manager, Business Services Division agreed to the appointment of a second Tender Evaluation Team. Three new Tender Evaluation Team members were appointed. The members of the second Tender Evaluation Team were informed of their appointment via email on 27 March 2020.

2.96 Similar to the first Tender Evaluation Team, the second Tender Evaluation Team included representatives from both Major Projects Canberra as well as the Education Directorate. The second Tender Evaluation Team comprised:

- a representative of Major Projects Canberra, from the Infrastructure Delivery Partners (Commercial Infrastructure Branch), as the Chair; and,
- two representatives from the Education Directorate, from the Infrastructure and Capital Works Branch.

2.97 As discussed in paragraph 2.14, the *Procurement Plan Minute* (July 2019) and the *Tender Evaluation Plan* (July 2019) had identified a senior representative from the Infrastructure Delivery Partners (Commercial Infrastructure Branch), Major Projects Canberra, as an Observer. This officer transitioned out of their role in Major Projects Canberra during February and March 2020 but in that time, and subsequent to that time, no other person was formally identified as having a role on the Tender Evaluation Team as an Observer.

2.98 In an interview under oath or affirmation, the chair of the second Tender Evaluation Team advised:

I got a phone call from [Executive Branch Manager, Commercial Infrastructure (Major Projects Canberra)] and [they] said that the delegate wasn't happy with the first evaluation and wanted a second evaluation done and that's where [they] asked me to take on that role.

2.99 In an interview under oath or affirmation, one of the members of the second Tender Evaluation Team advised:

I was asked to do an assessment of the original Tender Evaluation Report and provide a new Tender Evaluation Report, which we did ... and that's outlined in that document.

Second Signed Tender Evaluation Report (April 2020) (signed and endorsed)

2.100 The second Tender Evaluation Team reassessed the tenders against the six weighted evaluation criteria. The chair of the second Tender Evaluation Team, in an interview under oath or affirmation, advised:

When I took over as the Chair for the new TET (Tender Evaluation Team), to be fair, we didn't go through the previous documents, we wanted to do a sort of start from scratch a fresh look on it, and not be influenced by the previous teams' outcomes. So, we didn't delve too much into what happened, in that instance, we sort of started fresh.

2.101 The second Tender Evaluation Team produced a Tender Evaluation Report on 6 April 2020. The second signed Tender Evaluation Report was signed by the two members and the chair on 6 April 2020 respectively.

2.102 The second Tender Evaluation Team completed its assessment and report within a week of its appointment. This contrasts with approximately four weeks that the first Tender Evaluation Team took to prepare the draft Tender Evaluation Report that had been produced and circulated by late February 2020. In its response to the draft proposed report Major Projects Canberra advised 'the second evaluation was completed more rapidly than the target timeframe [of four weeks] as team members were instructed to prioritise this work given the implications for the timeframes for delivery of the project, and noting evaluation activities already completed.

2.103 Similar to the draft Tender Evaluation Report, the second signed Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers' assessment against each criterion and a proposed recommendation. Table 2-5 shows the scores and ranking of the tenderers.

Table 2-5 Second signed Tender Evaluation Report scoring

Respondent	Total Score	Ranking
Manteena	69.1	1
Lendlease	68.4	2

Source: Second signed Tender Evaluation Report (April 2020) (Major Projects Canberra).

2.104 The second signed Tender Evaluation Report provided a breakdown of the narrower scores against each of the weighted criteria. The second signed Tender Evaluation Report stated:

Following the assessment of all tenders, the TET came to the consensus agreement that Manteena Pty Ltd and Lendlease Building Pty Ltd both presented strong technical proposals and were low risk for the Territory. In this assessment the TET found that the scores based on each submitted tender were too close to clearly recommend a preferred tenderer. The TET are now seeking, under section 29.4 of the *Standard Conditions of Tender – Construction*, entering into a Best and Final Offer process for further assessment with a view to establish final ranking to determine a preferred tenderer.

2.105 The second signed Tender Evaluation Report recommended:

... entering into a Best and Final Offer (BAFO) process with Manteena Pty Ltd and Lendlease Building Pty Limited to establish final ranking to determine a preferred Tenderer. Additionally, the TET recommend increasing the Intellectual Property payment as per the attached Procurement Plan Minute Amendment.

2.106 The second signed Tender Evaluation Report was approved by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the Delegate on 8 April 2020.

2.107 On 27 March 2020 the Acting Executive Group Manager, Business Services Division (Education Directorate) agreed to the appointment of a second Tender Evaluation Team. Similar to the first Tender Evaluation Team, the second Tender Evaluation Team included representatives from both Major Projects Canberra as well as the Education Directorate. The second Tender Evaluation Team produced a Tender Evaluation Report, which was signed by the two members and the chair on 6 April 2020 respectively. Manteena was given a total score of 69.1 and Lendlease was given a total score of 68.4. The report identified that the two tenderers 'both presented strong technical proposals and were low risk for the Territory' and that 'the scores based on each submitted tender were too close to clearly recommend a preferred tenderer'. The report concluded a BAFO process be entered into. The second signed Tender Evaluation Report made the same recommendation as the first signed Tender Evaluation Report but the scores between the two tenderers were much narrower. The second signed Tender Evaluation Report was approved by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the Delegate on 8 April 2020.

Best and Final Offer process

2.108 On 7 April 2020, the Acting Executive Branch Manager, Infrastructure and Capital Works provided an Executive Minute to the Acting Executive Group Manager, Business Services

Division (Education Directorate) seeking delegate approval to release the request for a BAFO.

Request for Best and Final Offer

2.109 The request for a BAFO was issued to Manteena and Lendlease on 8 April 2020. Responses were due by 5 May 2020.

2.110 The tenderers were asked to revise their tenders against three of the six weighted criteria from the original RFT process. These formed the 'BAFO Assessable Criteria' and included:

- WC3: a demonstration that the project will be completed within the contract period (20 percent);
- WC4: a clear understanding of the project (30 percent); and
- WC5: financial offer (20 percent).

2.111 Tenderers were not asked to submit further responses in relation to the remaining three criteria:

- WC1: past performance (10 percent);
- WC2: technical, managerial skills, and resources to complete the project (10 percent); and
- WC6: industrial relations and regional contribution (10 percent).

2.112 Manteena provided a revised tender price of \$15,100,000 (GST ex) and Lendlease provided a revised tender price of \$15,997,366 (GST ex). Table 2-6 shows the tender price for the two tenderers, broken down by each of the phases.

Table 2-6 BAFO tender prices

Tenderer	Phase 1 tender price \$ (GST ex)	Phase 2 tender price \$ (GST ex)	Total tender price \$ (GST ex)
Manteena	471,104	14,628,896	15,100,000
Lendlease	499,080	15,498,286	15,997,366

Source: Third signed Tender Evaluation Report (June 2020) (Major Projects Canberra).

2.113 When preparing a third signed Tender Evaluation Report, the second Tender Evaluation Team noted 'the Lendlease BAFO submission failed to comply with the target budget of \$15.5m by excluding Phase 1 fees [in its response]'.

Third Signed Tender Evaluation Report – 5 June 2020

2.114 The second Tender Evaluation Team assessed the revised tenders from Manteena and Lendlease. On 5 June 2020, a third signed and final Tender Evaluation Report was signed by the second Tender Evaluation Team. Table 2-7 shows a summary of the evaluation of the tenderers' responses.

Table 2-7 Best and Final Offer Evaluation Report scoring

	WC1 – Past performance	WC2 – Skills and resources	WC3 – Project completion	WC4 – Understanding of project	WC5 – Financial offer	WC6 – Industrial relations	Total weighted score
Weighting	10%	10%	20%	30%	20%	10%	
Manteena	7	7	7.5	8	8	7.1	
	7	7	15	24	16	7.1	76.1
Lendlease	8	8	7	6.5	5	7.9	
	8	8	14	19.5	10	7.9	67.4

Source: Third signed Tender Evaluation Report (June 2020) (Major Projects Canberra).

2.115 The second Tender Evaluation Team re-assessed the revised tenders against the BAFO Assessable Criteria (criteria 3, 4 and 5), which comprised 70 percent of the total weighted score. The scores for the other three criteria were taken from the second signed Tender Evaluation Report approved by the Delegate on 8 April 2020.

2.116 The third signed Tender Evaluation Report for the BAFO process identified Manteena as the preferred tenderer. The third signed Tender Evaluation Report for the BAFO process stated:

Overall, both submission's resourcing and programs represent low risk. The differentiating criteria are the design and fee proposal. Additional funding would be required to proceed with the Lendlease proposal which makes their submission a medium risk. Manteena have presented a strong and cost-efficient design proposal that provides best value for money, and the lowest risk profile.

2.117 The third signed Tender Evaluation Report for the BAFO process recommended:

... entering into a contract for Phase 1 (design) with Manteena Pty Ltd for \$471,104.00 ex GST.

2.118 The Acting Executive Group Manager, Business Services Division (Education Directorate), as the delegate, did not sign or otherwise approve the third signed Tender Evaluation Report.

2.119 In response to the draft proposed report the Education Directorate noted that the Tender Evaluation Team did not identify that any of the tenders were non-conforming.

Recommendation to the Director-General

2.120 On 22 June 2020, the Acting Executive Group Manager, Business Services Division (Education Directorate) provided an Executive Brief to the Director-General of Education seeking:

[Agreement] to enter into contract for Phase 1 of the Campbell Modernisation with Lendlease Building Pty Ltd for \$499,080 (ex GST).

2.121 In response to the draft proposed report, the Education Directorate advised that the Brief was provided at the request of the Director-General.

2.122 The Executive Brief provided a brief summary of the procurement process. Attached to the brief was the third signed Tender Evaluation Report for the BAFO process that was signed by the second Tender Evaluation Team.

2.123 The Executive Brief stated:

9. The TET recommends that Manteena Pty Ltd be awarded the contract to undertake phase 1 (design development) of the project on the basis of Manteena's BAFO achieving the highest score in their evaluation.

10. The evaluation plan for the Campbell Primary School modernisation project has been approved by authorised officers in the Education Directorate and considered by the Government Procurement Board. Section 3.4(f) of the evaluation plan notes that the "preferred tenderer will be the tenderer offering the best value for money having regard to all relevant factors and may not necessarily be the tenderer with the highest score".

11. Having reviewed the report, I consider that the other tenderer, Lendlease Building Pty Ltd offers the best value for money despite a lower score in the TET's evaluation. This view is informed by two main factors described below.

12. Firstly, Lendlease outscored Manteena in the three evaluation criteria that were not reassessed as part of the BAFO. These criteria (WC1 – Past Performance, WC2 – Skills and Resources and WC6 – Secure Local Jobs Code) are reliable long term indicators of a company's ability to deliver quality projects and government initiatives such as Secure Local Jobs.

13. Secondly, while Manteena outscored Lendlease in the other three evaluation criteria that related to the design solution submitted as part of the tender process, the contract for the project allows for the re-design of the new buildings as part of the next phase of the project. Also under the procurement model, the directorate is assigned the Intellectual Property of the tenderers so that the best elements of each design can be used in the upcoming design development phase to produce the best overall design for the new building. At the end of first phase of the contract, the design and cost of the building is agreed in the building contract for phase 2.

14. In my consideration of the two BAFO's, the stronger proven track record of Lendlease over Manteena outweighs the weaker design submission submitted given the opportunity in phase 1 of the contract to further refine the design and cost of the proposal before entering phase 2.

15. In the Tender Evaluation Report, the team notes that "both submission's resourcing and programs represent low risk" before stating that the additional cost of Lendlease's proposal presents increased risk over Manteena's proposal. Given the opportunity in phase 1 to refine the design and cost before proceeding with phase 2 this risk can be mitigated.

2.124 On 25 June 2020 the Director-General agreed to the recommendation 'to enter into contract for Phase 1 of the Campbell Modernisation with Lendlease Building Pty Ltd' and in doing so annotated the Executive Brief as follows:

Approved – noting the reasons identified in paragraphs 12 – 15, in particular the importance of long-term factors.

2.125 In its response to the draft proposed report Manteena disagreed with the statement that 'under the procurement model, the directorate is assigned the Intellectual Property of the tenderers so that the best elements of each design can be used in the upcoming design development phase'. Manteena advised:

While the procurement model allows the assigning of Intellectual Property, this is up to the tenderer and not an obligation on the tenderer. Effectively the tenderer had the option to assign the [Intellectual Property] for a fee. Manteena could have chosen not to assign the [Intellectual Property] to the Territory and foregone the Copyright Assignment Fee, in which case the Territory would have been unable to use the 'preferred' design. If this eventuated, the argument made by the Acting Executive Group Manager, Business Services Division (Education Directorate) to use Manteena's design to improve Lendlease's design would not have occurred.

After we were advised that we were unsuccessful, Manteena were pressured to provide the completed Copyright Assignment Deed. The Territory took the position that we were compelled to sign it as it was effectively a condition of tendering that the [Intellectual Property] be assigned. Many of the design consultants in Manteena's team were reluctant to accede to this request but eventually provided this assignment.

2.126 Clause 5.8.1 of the RFT document stated:

The Territory has available [a sum] which it may at its sole and absolute discretion pay (in whole or in part, as it determines) to the unsuccessful Tenderer in exchange for the assignment of intellectual property rights in the unsuccessful Tenderer's Tender.

2.127 However, clause 5.8.4 of the RFT document states:

Any payment of the Available Sum will be subject to and conditional upon the assignment of proprietary rights, including ownership of all intellectual property rights, in the bidding material and design received from the relevant Tenderer in relation to the Tender.

2.128 Clause 5 of the BAFO request document states:

In recognition of the additional workload and cost associated with this BAFO process, it has been agreed that Intellectual Property payments of \$75,000 excluding GST will be made to both respondents should they proceed with the BAFO. As per the conditions of the RFT a \$75,000 excluding GST payment will be paid to the un-successful respondent in addition to the BAFO payment.

2.129 The BAFO request document is otherwise silent on the assignment of Intellectual Property rights but clause 13 states 'all other conditions of the RFT apply to this request for BAFO'.

2.130 The Audit Office considers that the assignment of the Intellectual Property rights for the re-design of the school buildings from the unsuccessful tenderer was not a *fait accompli*, and the presumption that 'the directorate is assigned the Intellectual Property of the tenderers so that the best elements of each design can be used in the upcoming design development phase' was incorrect.

Director-General as decision-maker

2.131 The Acting Executive Group Manager, Business Services Division (Education Directorate), had been the delegate for decision-making up to that point. The Audit Office sought advice as to why the Director-General became the decision-maker at that point.

2.132 In an interview under oath or affirmation the Acting Executive Group Manager, Business Services Division (Education Directorate) advised:

I absolutely know it was in my delegations to make that decision but that wasn't a decision I was going to make without some degree of oversight in that sense. So, wasn't going to look to overturn a Tender Evaluation Team's recommendation without setting out and explaining my reasons to in this case, my Director-General, on why I think I would not agree with a Tender Evaluation Team's recommendation and why I think that's the contractor and not that one.

...

If I'm taking advice, and just saying "nah, don't believe it, I want to make a different decision" that's something I think deserves some scrutiny, which is what that decision, that document is all about, which is, this is the reasons I think, this is the answer, and off to the next person up

the chain, who ultimately by the way was the person who delegates responsibility to me. In this case, I sort of said “not my delegation, your decision” in that way there.

...

And I think that’s important, because, you know, I could have made that decision, but it’s not a decision I’d like to make, overturning somebody else’s entire recommendation on that.

- 2.133 In an interview under oath or affirmation the Director-General also advised of an intention to take a more proactive role in the oversight of important projects:

When I returned from my leave in March 2020, during my handover from the Acting Director-General ... the matter of a discussion around the forthcoming contracts was handed over to me ... I believe one of the things [that was] passed on to me was a view for these important projects, potentially, the Director-General should be the Delegate. I didn’t take any action on that at the time, however, as the process went on, and it began ... it was starting to lose the timeliness was becoming an issue and there was a great deal of interest about it coming from various quarters of government, as you would have seen from the documents, it seemed to me that the only way that I would have any oversight of what was happening with that project was if I became the Delegate, and so that was a discussion that I had with [the Acting Executive Group Manager, Business Services Division].

- 2.134 In response to the draft proposed report the Education Directorate advised that it was the Director-General’s decision to become the final decision-maker.

Documentation of decision-making

- 2.135 The reasoning for the recommendation to the Director-General is embodied in four paragraphs in the Executive Brief. This contrasts with:

- the detail included in the third signed Tender Evaluation Report; and
- supporting documentation in the form of the Tender Evaluation Team’s individual Evaluation Worksheets which included detailed comments against the evaluation criteria.

- 2.136 In making the alternative recommendation to the Director-General, the Acting Executive Group Manager, Business Services Division (Education Directorate) was seeking to over-rule the professional advice of the Tender Evaluation Team. It was therefore incumbent on the Acting Executive Group Manager, Business Services Division (Education Directorate) to adequately and appropriately articulate their rationale and reasoning. This did not occur.

- 2.137 In response to the draft proposed report, the Education Directorate advised:

There is no guidance provided in existing procurement process documents as to the level of justification required to support an alternative recommendation to a delegate. The content of the Executive Brief included considerations and recommendations for the Director-General which were accepted.

- 2.138 The Executive Brief notes ‘Lendlease outsourced Manteena in the three evaluation criteria that were not reassessed as part of the BAFO’ and that ‘[these] are reliable long term indicators of a company’s ability to deliver quality projects and government initiatives such as Secure Local Jobs’. No further information is provided in the Executive Brief to explain this viewpoint.

2.139 The Executive Brief also notes ‘the stronger proven track record of Lendlease over Manteena outweighs the weaker design submission submitted’. No further information is provided to support the assertion that Lendlease has a ‘stronger proven track record’. In its response to the draft proposed report the Education Directorate advised:

The “long term factors” referred to by the Acting Executive Group Manager, Business Services Division (Education Directorate) was in reference to the past performance of Lendlease as the Tender Evaluation Team identified Lendlease as having superior past performance than Manteena as evidenced in the [Tender Evaluation Report].

2.140 The *Tender Evaluation Plan* (July 2019) acknowledges that ‘the preferred tenderer will be the tenderer offering best value for money having regard to all relevant factors and may not necessarily be the tenderer with the highest score’. However, the *Tender Evaluation Plan* (July 2019) also states:

If the preferred tenderer is not the tenderer with the highest score, full justification for selection of another tender will be provided.

2.141 In response to a request for a Best and Final Offer from the two tenderers, Manteena provided a revised tender price of \$15,100,000 (GST ex) and Lendlease provided a revised tender price of \$15,997,366 (GST ex). The tenderers were asked to revise their tenders against three of the six weighted criteria from the original RFT process, namely: WC3: a demonstration that the project will be completed within the contract period (20 percent); WC4: a clear understanding of the project (30 percent); and WC5: financial offer (20 percent). The scores for the remaining three criteria from the original RFT process were to remain. A third signed and final Tender Evaluation Report was prepared and signed by the second Tender Evaluation Team. The report gave Manteena a score of 76.1 and Lendlease a score of 67.4. The report stated ‘Manteena have presented a strong and cost-efficient design proposal that provides best value for money, and the lowest risk profile’ and sought approval to enter into a contract for Phase 1 of the project with Manteena. At the time the Acting Executive Group Manager, Business Services Division (Education Directorate) did not sign or endorse the third signed Tender Evaluation Report, but instead provided an Executive Brief to the Director-General of the Education Directorate that sought approval to enter into a contract for Phase 1 of the project with Lendlease.

2.142 The reasoning for the recommendation to the Director-General is embodied in four paragraphs in the Executive Brief. In making the alternative recommendation to the Director-General, the Acting Executive Group Manager, Business Services Division (Education Directorate) was seeking to over-rule the professional advice of the Tender Evaluation Team. It was therefore incumbent on the Acting Executive Group Manager, Business Services Division (Education Directorate) to adequately and appropriately document their rationale and reasoning. This did not occur. There was inadequate documentation to support the recommendation to enter into a contract with Lendlease, as opposed to Manteena. A key factor in the decision was an expectation that the Directorate was assigned the Intellectual Property of the tenderers, in the form of the re-design of the buildings, so that the ‘best elements of each design can be used in the upcoming design development phase’. The Audit Office considers that the assignment of the Intellectual Property rights for the re-design of the school buildings from the unsuccessful tenderer was

not a *fait accompli*, and the presumption that ‘the best elements of each design can be used in the upcoming design development phase’ was incorrect.

Evaluation considerations

2.143 The Audit Office sought further advice and explanation from the Acting Executive Group Manager, Business Services Division (Education Directorate) as to the rationale for their recommendation to the Director-General. In doing so the Audit Office noted that the Acting Executive Group Manager, Business Services Division produced a document in February 2021 that sought to provide further insight and explanation as to their recommendation to the Director-General at the time. The document stated:

In my review of the Tender evaluation report (prepared by the members of the Tender Evaluation Panel) I noted two main factors for further consideration.

2.144 The February 2021 document produced by the Acting Executive Group Manager, Business Services Division (Education Directorate) noted that the three evaluation criteria not reconsidered as part of the BAFO process were important as ‘long term’ factors of performance:

Firstly, the long-term indicators (such as past performance, skills & resources, and Secure Local Jobs) had not been reconsidered as part of the BAFO and Lend Lease outscored Manteena on the categories.

2.145 The February 2021 document produced by the Acting Executive Group Manager, Business Services Division (Education Directorate) also noted that Lendlease had closed the pricing gap with Manteena and that this gap could be further closed and refined during the design and construct process:

Secondly, while Manteena outscored Lend Lease on the criteria directly influenced by their design, they had closed the pricing gap (based on the limited feedback they received as part of the BAFO) and noted that in a design and construct contract, those design refinements could be continued by whichever company was in contract with the territory in a detailed design phase.

Ability to ‘close the pricing gap’

2.146 The February 2021 document produced by the Acting Executive Group Manager, Business Services Division (Education Directorate) noted:

The BAFO team were assisting in the evaluation of the design by [Infrastructure and Capital Works’] pedagogy lead (an experienced school principal) who had recently joined the branch. [Their] input in the assessment increased the difference between the Manteena and Lendlease score for design understanding from the Tender scoring (which [they] hadn’t been involved with).

However, [their] other advice about both designs was that they were based on the 2019 version of the Education Development Infrastructure Specification, which [they] had joined [Infrastructure and Capital Works] to review. At the time of the BAFO, the review outcomes included increased site line / visibility requirements, new functional relationships between the spaces and an increase in the space allocation per student.

The advice I was receiving is that both designs were going to have to evolve once a company was in a design development contract and we could have direct conversations outside of a procurement process.

Lendlease had demonstrated that they could make significant changes to their design from tender to BAFO and in my view, this would continue with the stronger site team.

2.147 In an interview under oath or affirmation the Acting Executive Group Manager, Business Services Division (Education Directorate) elaborated on this consideration:

So, in my view, looking at the report, [the Tender Evaluation Team] had re-assessed a number of factors, basically, relating to the design at that time there, and they were assessing strictly in accordance with the documents that went out and all that sort of stuff there, and I had a couple different conversations going on at that point there, one of which was from my new pedagogy expert in ICW ... who had done the review of the design and how it fits in relation to our [Education Directorate Infrastructure Specifications] ... essentially our school design book in that. So, a couple of conversations happening in that sense.

2.148 The Acting Executive Group Manager, Business Services Division (Education Directorate) further advised:

So, the views I was getting back from my pedagogy person was that both those designs aren't going to work. ... Neither of those designs were actually going to get built, we were going to be evolving those designs and coming up with a new design that actually met the current interpretation or the current views on what EDIS should be providing in terms of space for kids and facilities and all that sort of stuff there, the pedagogy side of it.

2.149 The February 2021 document produced by the Acting Executive Group Manager, Business Services Division acknowledged that Manteena provided a better design for the project and therefore received a higher score for 'WC4: a clear understanding of the project (30 percent)'. However, the February 2021 document also asserted:

- 'both designs were going to have to evolve once a company was in a design development contract'; and
- 'Lendlease had demonstrated that they could make significant changes to their design from tender to BAFO'.

2.150 Notwithstanding that Manteena had been identified as having the better design by the Tender Evaluation Teams, in the BAFO process and earlier RFT process, the Acting Executive Group Manager, Business Services Division (Education Directorate) identified Lendlease as the preferred tenderer because they had demonstrated an ability to 'close the gap' with Manteena between the RFT and the BAFO. This is unfair. Such an assessment does not fairly value or reward the efforts of a tenderer and the merits of their tender. As discussed in paragraphs 2.81 to 2.82, the decision to proceed to a BAFO process was inherently more beneficial to Lendlease than it was to Manteena, based on the first Tender Evaluation Team's assessment, as identified in the draft Tender Evaluation Report.

- 2.151 In their response to the draft proposed report the Acting Executive Group Manager, Business Services Division (Education Directorate) noted:

The procurement process was intentionally designed to enable the Directorate to leverage the best design elements of each tender to be incorporated into the final built outcome. This was clear and transparent in the tender documentation.

As an interactive design and construct tender, both tenderers were aware that the tendered designs (for which the Territory paid to transfer the IP) would be used to further refine the design in phase 2 of the contract. Lendlease made the larger reduction as part of their phase 2 BAFO offer and therefore demonstrated their ability to manage costs to the Territory during the remainder of the project. This is a fair consideration in relation to the best procurement outcome for the Territory.

- 2.152 The Acting Executive Group Manager, Business Services Division (Education Directorate) produced a document in February 2021 that sought to provide further insight and explanation as to their recommendation to the Director-General to enter into a contract with Lendlease. The February 2021 document acknowledged that 'Manteena outscored Lend Lease on the criteria directly influenced by their design' but that Lendlease 'had closed the pricing gap (based on the limited feedback they received as part of the BAFO) ... [and] in a design and construct contract, those design refinements could be continued by whichever company was in contract with the territory in a detailed design phase'. This is unfair. Such an assessment does not fairly value or reward the efforts of a tenderer and the merits of their tender.

'Long term' factors

- 2.153 The February 2021 document produced by the Acting Executive Group Manager, Business Services Division (Education Directorate) noted:

In my experience a strong project team is a key element for success on a brownfields project such as Campbell. This becomes even more important as project timelines are under pressure with late construction start and a fixed opening date (as happens in school projects). With the elongated tender / BAFO timeline this was obviously going to become a pressure at Campbell. In my role of delivering the education capital works program, I placed a high importance of the risk to the territory of not delivering this piece of social infrastructure.

Weaker site teams under pressure due to timing and scope changes create extra risk to the territory. This has recently demonstrated once again on a current EDU project ...

- 2.154 Notwithstanding this assertion it is noted that the third assessment criteria was 'a demonstration that the project will be completed within the contract period' and this was assessed by the second Tender Evaluation Team and documented in the third signed Tender Evaluation Report. Manteena scored higher than Lendlease on this criterion.

- 2.155 In an interview under oath or affirmation in June 2021, the Acting Executive Group Manager, Business Services (Education Directorate) elaborated on what they described as the 'long term' factors that they took into account in their decision-making:

Long term, company performance is based on the culture of the company and sustaining a level of performance over the years, in a project where there's lots of change ... The long-term factors are a bit of an indicator of where it's going to go to. So, to me some of the risk about

the fact we were about to change design triggers what I see some of the risk factors on Manteena ...

Manteena in my view are better at a straight line of work, give them a nice greenfield site, let them go. LendLease are better at managing complex situations, tight deadlines, and changing environments in that way. So, that's, that's the sort of thoughts in my head, and based on my experience with the companies and my observations of how they perform in the local marketplace, in that sense there. Yeah, the project was going to get challenging because we were going to be changing the design, and we still have a hard deadline about when we're going to open the school. So, it was going to be one of those projects, which is evolving as it goes, and in my mind, that wasn't where Manteena's strengths are ...

- 2.156 In an interview under oath or affirmation, the Acting Executive Group Manager, Business Services Division (Education Directorate) referred to their previous role as the Secure Local Jobs Code Registrar between November 2018 and January 2020, and how this experience had influenced their consideration:

So, Lendlease had been scored by I think, the original Tender Evaluation Team, as better systems, better people, and better performance on the social measures, including LIPP (Local Industry Participation Policy) and Secure Local Jobs, and all those other bits that have been my life for the year before. So, that's where my differing recommendation to the Director-General was that I actually don't think the way the scores went, essentially, the way the scores work is that you're going to get that outcome, when I don't think that's the best outcome, I think the best outcome is to go with LendLease, who are the better contractor for what we're doing, noting that that design, the first thing we are going to do it in phase one is throw it out, or not throw it out, evolve it, radically, to get a design that works for what we want to do for school.

- 2.157 In their response to the draft proposed the Acting Executive Group Manager, Business Services Division (Education Directorate) noted 'the long term factors [were] in reference to the past performance of Lendlease as the [Tender Evaluation Team] identified Lendlease as having superior past performance than Manteena as evidenced in the [Tender Evaluation Report]'.

- 2.158 The February 2021 document identified that the protracted procurement process for the Campbell Primary School Modernisation Project created risks for the delivery of the project and it asserted that Lendlease was in a stronger position to manage these risks due to 'long term factors'. In doing so, the Acting Executive Group Manager, Business Services Division (Education Directorate) referred to their previous role as the Secure Local Jobs Code Registrar between November 2018 and January 2020, and how knowledge and understanding from this experience had influenced their consideration. The conduct and timing of the procurement process, including the decision to go to a BAFO process, was within the responsibility and control of the Territory; it is unfair to identify risks deriving from the protracted procurement process as a basis on which to penalise a tenderer that had consistently been identified as the preferred supplier throughout the process. The Acting Executive Group Manager, Business Services Division (Education Directorate) asserted that Lendlease was likely to perform better based on 'long term factors'. In their response to the draft proposed report the Acting Executive Group Manager, Business Services Division (Education Directorate) advised that this assessment was based on the second Tender Evaluation Team's assessment of the RFT responses and the scoring of 'WC1 – past performance' (Lendlease received a score of 8 and Manteena received a score of 7).

Value for money

2.159 The *Tender Evaluation Plan* (July 2019) allowed for an ‘overall assessment of value for money’:

Following assessment of Tenders against the Assessment Criteria, to determine the overall final ranking of Tenderers, the evaluation team may conduct a final qualitative assessment of overall value for money taking into account, for example:

(i) risk (which may include, without limitation, financial risk and risk arising as a result of the Tender being assessed as an unacceptably high risk against any Assessment Criteria);

(ii) the results of the evaluation against the Assessment Criteria;

(iii) whole of life (WOL) costs; and

(iv) any other matter set out in, or relevant to, the *Government Procurement Act 2001* (ACT).

2.160 The 22 June 2020 Executive Brief to the Director-General from the Acting Executive Group Manager, Business Services Division (Education Directorate) asserted that Lendlease ‘offers the best value for money despite a lower score in the TET’s evaluation’ and that this was possible by virtue of the *Tender Evaluation Plan* (July 2019):

10. ... Section 3.4(f) of the evaluation plan notes that the “preferred tenderer will be the tenderer offering the best value for money having regard to all relevant factors and may not necessarily be the tenderer with the highest score”.

2.161 The February 2021 document produced by the Acting Executive Group Manager, Business Services Division (Education Directorate) similarly noted that the preferred tenderer may not necessarily be the tenderer with the lowest score:

In the brief I set out a case why the preferred tenderer should be the tenderer offering the best value for money having regard to all relevant factors and may not necessarily be the tenderer with the highest score.

2.162 In an interview under oath or affirmation, in response to the questions ‘Did you introduce another scoring regime? In your process? In your recommendation?’ the Acting Executive Group Manager, Business Services Division (Education Directorate) advised:

I don't think I introduced another scoring regime. I don't think I took the scores that were there on board. What I think I did in terms of reading that one there is, in my mind, I kind of thought is that the right weighting? On those factors? And I think that's where my mind was, is that the right set of weighting on those points there? And then went to the part of the Procurement Plan that talks about the fact well, it's the overall value for money, it's the overall risk to the Territory, it's all of those things, and the highest score isn't necessarily going to be the one who wins the job, and that was clearly in the Procurement Plan, it's been endorsed by the Government Procurement Board, and it's there for those sorts of those things there.

2.163 In its response to the draft proposed report, the Education Directorate advised:

The Acting Executive Group Manager, Business Services Division (Education Directorate)’s justification on what was the best management of risk for the complex project was based on professional judgement of the Acting Executive Group Manager, Business Services Division (Education Directorate), as an Executive with significant experience with delivering capital works.

2.164 In response to the draft proposed report the Acting Executive Group Manager, Business Services Division (Education Directorate) noted:

The draft report seems to imply that taking a decision that is contrary to the ratings or weightings is unfair. However, it is not mathematically possible for the delegate to vary from the recommendation of a [Tender Evaluation Team] without having the effect of changing either or both of the weightings or ratings. Therefore, the draft report seems to assume that the Delegate should not make a decision other than the recommendation in spite of the clause in the [*Tender Evaluation Plan (2019)*] (approved by [the ACT Government Solicitor's Office] and Government Procurement Board) stating that they have that option.

...

Presented with a tender evaluation report that suggested a relatively small local construction company would be 50% superior to a national tier 1 construction company on a brown field site, my view as a delegate was that it needed to be reviewed. In doing so, I engaged with the finding and worked transparently seeking the views of [Major Projects Canberra] and the [ACT Government Solicitor's Office] in the process. Rather than being unfair, it was the appropriate and reasonable exercise of a delegate's role to achieve the best procurement outcome for the Territory.

I also note that the Director-General was the final decision maker on the procurement and endorsed my assessment of the best procurement outcome for the Territory.

2.165 In its response to the final proposed report Manteena advised:

Manteena have operated successfully for over 40 years in the ACT and throughout Australia with over 100 staff. In Canberra, Manteena have delivered multiple education projects including several for ACT Government valued at in excess of \$50M each in Belconnen and Tuggeranong, as well as many large schools in Gungahlin and were also a significant contributor to the BER program. Additionally, Manteena has been engaged to deliver some of the Territory's most complex and significant projects including the COVID-19 Surge Centre in Garran. Around the timing of the decision to not engage Manteena on the Campbell School project, Manteena were awarded a major extension to the Intensive Care Unit at the Canberra Hospital by ACT Government which involved complex brownfield extension and refurbishment works. Manteena rejects the assertion that we were somehow less capable of delivering the Campbell Primary School Modernisation project.

2.166 The *Tender Evaluation Plan (July 2019)* allowed for an 'overall assessment of value for money' and countenanced that the preferred tenderer might not be the 'the tenderer with the highest score'. In doing so, however, the *Tender Evaluation Plan (July 2019)* required that 'full justification for selection of another will be provided'. This did not occur at the time of the decision by the Director-General of the Education Directorate. Subsequently, in February 2021 and in June 2021 in an interview under oath or affirmation, the Acting Executive Group Manager, Business Services Division (Education Directorate) sought to provide a rationale as to why they believed the tenderer with the higher price and lower score against the weighted evaluation criteria offered 'overall value for money'. In doing so they effectively re-weighted and re-prioritised the evaluation criteria with which the Territory approached the market and sought tenders. Probity was not demonstrated in the procurement process to 'deal fairly, impartially and consistently with suppliers', as provided for by *Procurement Policy Circular PC 21: Probity and Ethical Behaviour*.

RECOMMENDATION 1 PROBITY ADVICE

Major Projects Canberra, in cooperation with Procurement ACT, should review and revise its procurement guidance documentation, and associated templates, to explicitly require the preparation of independent probity advice where a delegate or decision-maker seeks to over-rule the recommendation of the tender evaluation team.

3 GOVERNANCE AND ADMINISTRATIVE MATTERS

- 3.1 During the audit a number of governance and administrative matters relating to the procurement were identified. This chapter discusses the documentation of roles and responsibilities, the management of risk (including probity risk), communication processes with tenderers and the tender debrief process. The chapter also discusses risks associated with the amended standard contractual terms and conditions that were negotiated with Lendlease as the preferred tenderer.

Summary

Conclusion

During the course of the audit a number of governance and administrative shortcomings in the procurement process were identified. These relate to the documentation of roles and responsibilities, procurement risk management (including probity risk management), the use of *Confidentiality and Conflict of Interest Undertaking forms* by participants, communication processes with tenderers and the tender debrief process.

A risk relating to the probity of the procurement process was the participation and involvement of various staff from Major Projects Canberra and the Education Directorate whose roles and responsibilities were not specifically and explicitly documented in procurement governance documents such as the *Tender Evaluation Plan* (July 2019) or *Procurement Plan Minute* (July 2019). Managers and supervisors had an 'oversight' and 'quality assurance' role which involved reviewing draft tender evaluation reports completed by the Tender Evaluation Teams. This allows for potential influence or interference to occur without explicit and specific clarity on their role and purpose.

The procurement process was also characterised by informal, uncontrolled and poorly documented communication with tenderers and other parties. This undermines the probity of the procurement process.

Key findings

In its response to the RFT, Lendlease identified a number of proposed departures from the Territory's standard contractual terms and conditions. The most significant proposed departure sought to limit the sum payable as compensation to the Territory for any loss arising from a breach of contract by Lendlease to 50 percent of the value of the contract. There is evidence that the Chair of the first Tender Evaluation Team identified the proposed changes to the standard contractual terms and conditions as a risk in February 2020, but they were not specifically and explicitly

Paragraph

3.29

documented in any of the tender evaluation reports that were subsequently produced by either of the Tender Evaluation Teams. Following the identification of Lendlease as the preferred tenderer in late June 2020 Major Projects Canberra commenced negotiations with Lendlease, with the major focus of negotiation being the proposed cap on general liability. Considerable effort was put into the negotiations, which were finally concluded on 10 September 2020, with Lendlease agreeing to a cap on general liability of 200 percent of the value of the works. The effect of accepting a lower cap on liability is that the Territory has less recourse to pursue the contractor for damages, costs and any losses incurred. The time taken to negotiate the final contract put further pressure on the delivery of the project.

The *Procurement Plan Minute* (July 2019) and the *Tender Evaluation Plan* (July 2019) identified four members of the Tender Evaluation Team and documented their role and responsibilities in the procurement process. In addition to the Tender Evaluation Teams, a range of staff in both Major Projects Canberra and the Education Directorate were involved in the procurement. Managers and supervisors had an 'oversight' and 'quality assurance' role, which involved reviewing draft tender evaluation reports completed by the Tender Evaluation Teams. There is also evidence that advice was sought from other Major Projects Canberra officers at various times during the procurement. The *Tender Evaluation Plan* (July 2019) notes the '[Tender Evaluation Team] may, as required, utilise specialist advice to assist in the evaluation process' and that 'the areas of expertise may include ... probity and technical procurement advice, including from the ACT Government Solicitor and IFCW Directors/Managers (such advice may include, but not be limited to, technical drafting advice and review of draft evaluation reports for clarity and consistency with the *Government Procurement Act 2001* (ACT) and the [Request for Tender]'. There is no further information with respect to the roles and responsibilities of these other participants and the nature and purpose of their participation. This allows for potential influence or interference to occur without explicit and specific clarity on their role and purpose. The lack of clarity associated with the role and responsibilities of these other participants increases the probity risks for the procurement.

3.42

A Procurement Risk Management Plan was developed for the Campbell Primary School Modernisation Project procurement. The Plan was an attachment to the *Procurement Plan Minute* (July 2019). The Plan identified a range of risks that were relevant at the outset of the procurement, with related treatments and responsible owners identified to manage each risk. There was no evidence that the Procurement Risk Management Plan was reviewed or updated during the procurement process. By not reviewing and updating the Procurement Risk Management Plan as necessary during the procurement, there was a missed opportunity to use it as an ongoing tool to help manage the increasing risks associated with the procurement.

3.48

There was limited consideration of probity considerations in the Procurement Risk Management Plan. One probity-related risk was identified (unethical tender process or inadequate tender and evaluation leads to a breach of probity) for which the controls to manage this risk were identified as 'effective'. There is no evidence that this probity risk was monitored and reported against throughout the procurement;

3.60

the risk was not updated, and the controls re-assessed, at key developments of the procurement process which appeared to give rise to additional or enhanced risks.

The *Tender Evaluation Plan* (July 2019) required 'evaluation team members, specialist advisors and Consultants ... to provide written acknowledgement of confidentiality and declaration of conflicts of interest prior to the commencement of the evaluation process using the appropriate form'. To assist with this Major Projects Canberra has developed a *Confidentiality and Conflict of Interest Undertaking* form'. A *Confidentiality and Conflict of Interest Undertaking* form was evident for five of the six members of the Tender Evaluation Teams that had responsibility for evaluating the tenders as well as the officer identified as having an Observer role for the first Tender Evaluation Team (the Audit Office was advised that a form was completed for one of the members of the Second Evaluation Team but it was unable to be produced). No forms were prepared for any of the other participants in the procurement process. By not ensuring that a *Confidentiality and Conflict of Interest Undertaking* form is completed by all participants in the procurement process, Major Projects Canberra is not rigorously and comprehensively ensuring that all potential conflicts of interest are acknowledged as appropriate. 3.69

Appropriate, controlled and transparent communication processes are necessary in a procurement process to ensure all suppliers are dealt with fairly and equitably. Communication with tenderers was not appropriate, controlled or adequately documented. There was evidence of: individual communication with tenderers; communication not being recorded; and communication with third parties in relation to the procurement process. No specific Communications Plan or Communications Protocol was developed or implemented for the procurement. By not consistently and transparently communicating with tenderers, and communicating with third parties in relation to the procurement, the probity risks associated with the procurement process are increased. 3.79

A tender debrief process is useful for unsuccessful tenderers to identify why they were not selected and how they can improve future tender submissions. The *Tender Evaluation Plan* (2019) identified that the Tender Evaluation Team would be responsible for 'debriefing unsuccessful respondents'. The usual practice was for the tender debrief process to be facilitated by Major Projects Canberra staff, who typically occupy the position of the chair of the tender evaluation team. Following the decision to appoint Lendlease as the preferred tenderer, contrary to the recommendation of the Tender Evaluation Team, the Director-General of Major Projects Canberra instructed that the tender debrief process was to be undertaken by Education Directorate representatives and that no Major Projects Canberra staff were to be involved. 3.88

On the basis of information provided in interviews under oath or affirmation, it is apparent that a meeting occurred online to discuss the tender process and it is apparent that it was attended by representatives of Manteena, the Acting Executive Group Manager, Business Services Division (Education Directorate) and the two Education Directorate members of the second Tender Evaluation Team. There is no documentary evidence or record maintained by the Education Directorate of this meeting. Participants recalled the tender process and assessment was discussed at this meeting. The Acting Executive Group Manager, Business Services Division 3.89

(Education Directorate) recalled another meeting taking place in a coffee shop at which the tender process and assessment was discussed and this 'was very similar to what a debrief was, but it wasn't the debrief'. Notwithstanding the meetings at which the tender process and evaluation was discussed the Education Directorate and Acting Executive Group Manager, Business Services Division (Education Directorate) advised that the absence of Major Projects Canberra staff meant that a tender debrief did not occur. A tender debrief was not conducted in an open, transparent and accountable manner.

Contract negotiations

3.2 Following the 25 June 2020 agreement of the Director-General 'to enter into contract for Phase 1 of the Campbell Modernisation with Lendlease Building Pty Ltd' representatives of Major Projects Canberra commenced a process to negotiate the terms and conditions of the contract. In its response to the draft proposed report Major Projects Canberra noted that:

The negotiation outcomes were for ultimate approval or rejection by the Delegate within the Education Directorate. Major Projects Canberra manage the negotiation and contract award process but each contract departure and term is approved by the Education Directorate.

Standard contractual terms and conditions

3.3 The Territory's standard contractual terms and conditions, as embodied in the *GC21 Head Contract – General Conditions of Contract for design and construction services*, were provided to prospective tenderers through the RFT documentation. The use of standard contractual terms and conditions across Territory contracts allows:

- the Territory and prospective tenderers to develop and share common expectations for the contractual arrangements at the time the market is approached; and
- prospective tenderers to provide a response, and an associated contract price, that is reflective of their commercial appetite for risk.

3.4 As part of their response to the RFT, tenderers were required to either:

- accept (without departure, qualification, amendment, limitation or exclusion) the terms and conditions; or
- explain 'any proposed departures, qualifications, amendments, limitations or exclusions' to the terms and conditions. Tenderers were invited to identify any aspects of their tenders that involve a proposed departure from, or variation to, the provisions of the RFT in *Returnable Schedule 2 – Summary Schedule of Proposed Departures*.

Tenderers' proposed changes to standard contractual terms and conditions

3.5 Both tenderers submitted a *Returnable Schedule 2 – Summary Schedule of Proposed Departures* document as part of their tender. The documents identified the tenderers' proposed departures from the standard *GC21 Head Contract – General Conditions of Contract for design and construction services*.

Lendlease proposed departures

3.6 In its *Returnable Schedule 2 – Summary Schedule of Proposed Departures*, Lendlease identified a number of proposed departures from the standard contractual terms and conditions. These included departures relating to:

- costs associated with the removal of dangerous substances – Lendlease sought to provide for the removal of any dangerous substances on site as a 'provisional sum' as opposed to a 'fixed amount' identified and incorporated into the tender price;
- widening the circumstances in which an extension of time could be granted to the contractor for the delivery of the services;
- disallowing the Territory to make a demand against the contractor under the contract for any amounts arising from other contracts (i.e. 'set off'); and
- maintenance during post contract period – Lendlease sought to amend its obligations with respect to maintenance during the post completion period of the contract.

3.7 The most significant proposed departures from the standard contractual terms and conditions related to the clauses associated with:

- general liability cap and exclusion of consequential loss; and
- liquidated damages.

General liability cap and exclusion of consequential loss

3.8 The standard terms and conditions of the contract provided for uncapped liability for the contractor including consequential losses. Lendlease sought to 'agree upon mutually acceptable drafting to limit the Contractor's overall liability under the Contract to 50% of the value of the works, subject to market standard carve outs which include (without limitation) for property damage, death and injury' and 'agree upon a mutual exclusion of consequential loss'.

3.9 The effect of this change to the standard contractual terms and conditions would be to limit the sum payable as compensation to the Territory for any loss arising from a breach of contract by Lendlease.

Liquidated damages

3.10 In its response, Lendlease noted 'the rate for liquidated damages remains to be populated in the Contract' and that it '[reserved its position] on the acceptance of liquidated damages,

pending agreement on the amount acceptable to both parties'. In doing so, Lendlease noted 'our tender submission has been unable to account for the adoption of any exposure to liquidated damages, absent an amount being specified'.

Manteena proposed departures

- 3.11 In its *Returnable Schedule 2 – Summary Schedule of Proposed Departures* document, Manteena also identified proposed departures. Manteena's proposed departures related to technical aspects of the project, and related to alternative suggestions for delivering the design and construction services, differently to that identified in the RFT documentation.

Decision-makers' recognition of risks of departure

- 3.12 Neither the third Tender Evaluation Report (signed by the second Tender Evaluation Team on 5 June 2020) or the 25 June 2020 Executive Brief from the Acting Executive Group Manager, Business Services Division (Education Directorate) to the Director-General of the Education Directorate identified or documented the additional risks associated with Lendlease's tender and the proposed departures from the standard *GC21 Head Contract – General Conditions of Contract for design and construction services*.

- 3.13 In its response to the draft proposed report, Major Projects Canberra noted:

The Tender Evaluation Report identifies the tender from Lendlease had departures.

The Tender Evaluation Report did not go into specific details as the Tender Evaluation Team was not recommending to the delegate the appointment of Lendlease as the preferred bidder.

- 3.14 There was no discussion in the brief regarding the extent to which Lendlease's proposed changes to the standard contractual terms and conditions impacted the overall value for money assessment. There was also no advice to the Director-General on the risks and implications for the Territory of accepting Lendlease's proposed contract changes.

Earlier recognition of risks of departure

- 3.15 There is evidence that the Chair of the first Tender Evaluation Team identified the proposed changes to the standard contractual terms and conditions as a risk. In February 2020 the Chair of the first Tender Evaluation Team sought advice from the Project Director, Infrastructure Delivery Partners (Commercial Infrastructure Branch), Major Projects Canberra. In a February 2020 email exchange, the risks associated with the proposed changes, and Major Projects Canberra's position on the proposed changes, was discussed.

- 3.16 Notwithstanding the apparent recognition of the risks associated with the proposed changes to the standard contractual terms and conditions, they were not specifically and explicitly documented in any of the tender evaluation reports that were produced by either of the Tender Evaluation Teams or otherwise identified and acknowledged by Tender Evaluation Team members when assessing the tenders.

Contract negotiations with Lendlease

3.17 Following the Director-General's approval of Lendlease as the preferred tenderer on 25 June 2020, Major Projects Canberra representatives sought to develop a Letter of Award to Lendlease that would form the basis for the signed contract. The preparation and issuing of the Letter of Award was delayed while Major Projects Canberra officers sought to resolve Lendlease's proposed changes to the standard contractual terms and conditions. The Senior Project Manager (Major Projects Canberra) sought advice from the Senior Director, Contracts and Prequalification Section (Major Projects Canberra) on 29 June 2020 on Lendlease's proposed departures from the contractual terms and conditions. In an email on 29 June 2020 the Senior Project Manager (Major Projects Canberra) noted:

Not sure where we can go from here? Lendlease have been signed off as the preferred tenderer by the delegate. This wasn't the recommendation of the TET. Lendlease included in their original submission a list of exclusions that were not addressed by the TET as there was no negotiation after the BAFO was submitted and GSO advice wasn't sought after the BAFO closure – there was also no request in the TER to negotiate with what was recommended to be the unsuccessful tenderer – as this is not usually what we have to do ...

However, now that we are in this position should [we] be A) notifying the delegate that we need to negotiate other contract conditions with their preferred tenderer and B) negotiate on these items. OR notify the EDU they have just accepted the risks and departures of the Lendlease tender?

3.18 The Senior Director, Contracts and Prequalification Section (Major Projects Canberra) advised:

It is likely that MPC will not agree to any additional PS or clause amendments and therefore, in this case Lendlease will be required to withdraw amendments before MPC can issue the Letter of Award.

I suggest that the Chair of the TET advises the Delegate that Lendlease are not to be advised of their preferred tenderer status until such time as a position on the contract that we can agree to.

3.19 Notwithstanding the risks associated with the proposed departures from the standard contractual terms and conditions, and the reservations articulated by Major Projects Canberra representatives, on 2 July 2020 the Acting Executive Group Manager, Business Services Division (Education Directorate) approved the *Tender Evaluation Report – Contract Approvals* document. This document authorised the Tender Evaluation Team to *inter alia*:

- arrange for a contract to be prepared between the Territory and Lendlease, and
- offer a debrief to the unsuccessful tenderer, noting that the debrief was to be undertaken by the Tender Evaluation Team in conjunction with the Acting Executive Group Manager, Business Services Division (Education Directorate).

3.20 In response to the draft proposed report, the Senior Projects Manager (Major Projects Canberra) advised that they informed the second Tender Evaluation Team members on 29 June 2020 that there were proposed departures in Lendlease's submission and a meeting to discuss the departures was held on 30 June 2020 with representatives from the Education Directorate and Major Projects Canberra. On 2 July 2020 the Senior Projects Manager

(Major Projects Canberra) sent the list of proposed departures to the Acting Executive Group Manager, Business Services Division (Education Directorate) and recommended that the Education Directorate reject all of Lendlease's proposed departures.

- 3.21 In early July 2020 Major Projects Canberra commenced negotiations with Lendlease in relation to the proposed exclusions. Following early agreement by Lendlease to withdraw most of the proposed changes to the standard contractual terms and conditions identified in paragraph 3.6, the major focus of negotiation was the proposed cap on general liability. In order to inform its negotiations with Lendlease, including its potential appetite for agreeing to an amendment to the Territory's standard contractual terms and conditions, Major Projects Canberra sought advice from the ACT Government Solicitor's Office.

Legal advice to support contract negotiations with Lendlease

- 3.22 On 15 July 2020 the Senior Director, Contracts and Prequalification Section (Major Projects Canberra) sought advice from the ACT Government Solicitor's Office with respect to Lendlease's proposed cap on general liability. When requesting the advice, the Senior Director, Contracts and Prequalification Section (Major Projects Canberra) stated in their covering email:

The risk to the Territory is high as it is a full design and construct delivery. The cap proposed by Lendlease does not, in my opinion, reflect the risk associated with a design and construct contract in an occupied school environment.

We are also concerned about the exposure of the Territory to:

- Creating a precedent, noting that we have recently entered into GC21 Phase contracts for education projects with similar or greater values without any changes to terms of conditions; and
- Probity issue as the second tenderer in the BAFO has presumably priced the risk of indemnification.

- 3.23 The ACT Government Solicitor's Office further advised:

... it is a commercial decision for the relevant Directorate whether to agree to a cap on the contractor's liability under the contract.

The effect of accepting a cap on the contractor's liability is that if the Territory suffers loss caused by the contractor which is above the amount of the cap, the Territory will not be able to recover that cost from the contractor and will need to recover that cost itself. The cost would have to come out of the Directorate's budget, as it is not covered by insurance through ACTIA. Accepting a cap would also limit the Territory's common law rights.

If a cap is agreed, it should at a minimum be set to the total amount of the possible financial exposure to the Territory, based on a risk assessment. It should not be set at an arbitrary figure such as that requested by the Contractor...unless this also aligns with an acceptable level of financial exposure.

- 3.24 Contract negotiations occurred over a period of over two months. Considerable correspondence was generated, which sought to resolve the issue of Lendlease's general liability.

- 3.25 At the conclusion of the contract negotiations, the standard contractual terms and conditions were amended to limit the liability of Lendlease. A Letter of Award was sent from Major Projects Canberra to Lendlease on 10 September 2020, which referenced the original tender response, the revised BAFO offer and the correspondence that was generated between July 2020 and September 2020 as comprising Lendlease's 'revised offer'. The final agreed set of departures from the standard contractual terms and conditions were identified in a preceding letter dated 10 September 2020 from Lendlease to the Territory and included a general liability cap of 200 percent of the contract price.
- 3.26 The effect of accepting a lower cap on liability is that the Territory has less recourse to pursue the contractor for damages, costs and any losses incurred.
- 3.27 On 10 September 2020, the Territory and Lendlease signed a GC21 contract with Lendlease for \$17,050,000 (GST inclusive).
- 3.28 After Phase 1 of the contract between 10 September 2020 and late October 2020 was completed, the Territory and Lendlease agreed to a series of amendments to the contract. These amendments reflected scope changes agreed during Phase 1. These amendments increased the total contract value to \$17,754,042.31 (GST inclusive).
- 3.29 In its response to the RFT, Lendlease identified a number of proposed departures from the Territory's standard contractual terms and conditions. The most significant proposed departure sought to limit the sum payable as compensation to the Territory for any loss arising from a breach of contract by Lendlease to 50 percent of the value of the contract. There is evidence that the Chair of the first Tender Evaluation Team identified the proposed changes to the standard contractual terms and conditions as a risk in February 2020, but they were not specifically and explicitly documented in any of the tender evaluation reports that were subsequently produced by either of the Tender Evaluation Teams. Following the identification of Lendlease as the preferred tenderer in late June 2020 Major Projects Canberra commenced negotiations with Lendlease, with the major focus of negotiation being the proposed cap on general liability. Considerable effort was put into the negotiations, which were finally concluded on 10 September 2020, with Lendlease agreeing to a cap on general liability of 200 percent of the value of the works. The effect of accepting a lower cap on liability is that the Territory has less recourse to pursue the contractor for damages, costs and any losses incurred. The time taken to negotiate the final contract put further pressure on the delivery of the project.

Documentation of roles and responsibilities

- 3.30 Clear roles and responsibilities in a procurement are important to coordinate activities and expectations across the procurement team.

Role of the delegate

3.31 At the commencement of the procurement the *Procurement Plan Minute* (July 2019) and the *Tender Evaluation Plan* (July 2019) identified four members of the Tender Evaluation Team. The *Tender Evaluation Plan* (July 2019) stated:

The evaluation team will be responsible for:

- a) maintaining probity;
- b) evaluating the responses in accordance with the criteria and methodology;
- c) documenting the evaluation process;
- d) preparing an evaluation report;
- e) seek Director General or Delegate approval to commence post tender negotiations with the preferred tenderer;
- f) seek Director General or Delegate approval to proceed with a contract with the preferred respondent; and
- g) debriefing unsuccessful respondents.

3.32 Neither the *Procurement Plan Minute* (July 2019) or *Tender Evaluation Plan* (July 2019) identified the delegate for the procurement, either by name or position, or their role and responsibilities in the procurement.

Role of other staff

3.33 During the course of the audit it was apparent that other staff in both Major Projects Canberra and the Education Directorate were involved in the procurement. Outside of the tender evaluation teams, a range of other staff from Major Projects Canberra and the Education Directorate were involved in the procurement process.

3.34 As discussed in paragraphs 2.46 to 2.49, it is apparent that there was a practice of sharing draft tender evaluation reports with managers and supervisors within both Major Projects Canberra and the Education Directorate.

3.35 Through audit interviews under oath or affirmation, it is understood that managers and supervisors have an 'oversight' and 'quality assurance' role which involved reviewing draft tender evaluation reports prepared by the Tender Evaluation Teams. This allows for potential influence or interference to occur without explicit and specific clarity on their role and purpose.

- 3.36 In an interview under oath or affirmation the Executive Branch Manager, Commercial Infrastructure (Major Projects Canberra) identified that they had a quality assurance role in relation to tender evaluation reports:

I only do QA. So, when I look at the report, I do a quality assurance check on the report.

...

I do not provide an opinion on whether it should be tenderer A, B or C but I will look at those documents to make sure that they are robust, that they're FOI-able ... that they are clear, they are concise, and they are reasonable in what's being put forward.

...

I look at those documents because across the Territory, we need to be consistent and robust in the reports we put through the Delegate ... you're looking for anything that from a QA perspective, stands out as "did you check that?" And you'll ask that question, and you'll ask it of the Chair ... But it's a QA perspective, to make sure that we're doing it the right way.

- 3.37 In an interview under oath or affirmation the Acting Executive Branch Manager, Infrastructure and Capital Works Branch (Education Directorate) identified that they had a role in authorising aspects of the procurement:

So, my role [was] to review and authorise the procurement, the recommendation of the Tender Evaluation Team, and for that to my supervisor for Delegate approval.

- 3.38 In an interview under oath or affirmation the Acting Executive Branch Manager, Infrastructure and Capital Works Branch (Education Directorate) further advised that they participated in the review of tender evaluation reports:

When the Tender Evaluation Report was provided to me, it was reviewing that document, reading through the recommendations, discussing with the Tender Evaluation Team, discussing with the [Acting Executive Group Manager, Business Division (Education)], then processing it through for approval.

- 3.39 In its response to the draft proposed report, Major Projects Canberra advised that the *Tender Evaluation Plan* (July 2019) defined a role for managers and supervisors, which allowed for them to participate in the procurement process:

The evaluation team may, as required, utilise specialist advice to assist in the evaluation process.

The areas of expertise may include:

a) technical analysis, including advice from Consultants and IFCW Directors/Managers;

...

f) probity and technical procurement advice, including from the ACT Government Solicitor and IFCW Directors/Managers (such advice may include, but not be limited to, technical drafting advice and review of draft evaluation reports for clarity and consistency with the *Government Procurement Act 2001* (ACT) and the [Request for Tender]; and

g) legal issues, including advice from the ACT Government Solicitor.

- 3.40 Other than the discretionary statement in the *Tender Evaluation Plan* (July 2019), there is no further information with respect to the roles and responsibilities of these other participants and the nature and purpose of their participation. It allows for participation in the procurement process without specific accountability.

3.41 As discussed in Chapter 2 of this report, the Acting Executive Group Manager, Business Services Division (Education Directorate), became apprised of the draft Tender Evaluation Report from the first Tender Evaluation Team and sought to influence the procurement process. This appears to have arisen from the practice of sharing the report across the participants. In an interview under oath or affirmation, however, the Acting Executive Group Manager, Business Services Division (Education Directorate) advised:

... its normal process that say the draft Evaluation Reports are drafted within Major Projects Canberra, that they are reviewed by managers within that organisation, and that that's shared amongst the larger Project Teams.

...

I think it's clean, because we're all part of ACT Government, and while stays within the ACT Government, I think it's clean.

3.42 The *Procurement Plan Minute* (July 2019) and the *Tender Evaluation Plan* (July 2019) identified four members of the Tender Evaluation Team and documented their role and responsibilities in the procurement process. In addition to the Tender Evaluation Teams, a range of staff in both Major Projects Canberra and the Education Directorate were involved in the procurement. Managers and supervisors had an 'oversight' and 'quality assurance' role, which involved reviewing draft tender evaluation reports completed by the Tender Evaluation Teams. There is also evidence that advice was sought from other Major Projects Canberra officers at various times during the procurement. The *Tender Evaluation Plan* (July 2019) notes the '[Tender Evaluation Team] may, as required, utilise specialist advice to assist in the evaluation process' and that 'the areas of expertise may include ... probity and technical procurement advice, including from the ACT Government Solicitor and IFCW Directors/Managers (such advice may include, but not be limited to, technical drafting advice and review of draft evaluation reports for clarity and consistency with the *Government Procurement Act 2001* (ACT) and the [Request for Tender]'. There is no further information with respect to the roles and responsibilities of these other participants and the nature and purpose of their participation. This allows for potential influence or interference to occur without explicit and specific clarity on their role and purpose. The lack of clarity associated with the role and responsibilities of these other participants increases the probity risks for the procurement.

RECOMMENDATION 2

DOCUMENTATION OF ROLES AND RESPONSIBILITIES

Major Projects Canberra, in cooperation with Procurement ACT, should review and revise its procurement planning and tender evaluation templates and guidance documents to require:

- a) the identification and acknowledgement of all participants in the procurement process, including the Delegate and those with managerial and supervisory responsibilities; and
- b) the identification and documentation of the specific roles and responsibilities of all participants in the process.

Planning for probity and risk management

Procurement risk management

3.43 In any procurement process, risk management is important in helping managers to prioritise activities and put treatments in place to manage associated risks. Procurement ACT's *Procurement Circular 24: Risk Management* outlines the importance of applying effective risk management during a procurement. The Circular outlines three keys to managing risk effectively:

Early and systematic identification, analysis and assessment of risks and developing plans for handling them;

Allocating responsibility to the party best placed to manage risks, which may involve implementing new practices, procedures or systems, or simply negotiating suitable contractual arrangements; and

Ensuring that the costs incurred in risk management are commensurate with the importance of the procurement activity and the risks involved.

3.44 Major Projects Canberra has designed a risk management plan template to support procurement processes on behalf of partner directorates. The template is intended to provide direction to staff that is consistent with *Procurement Circular 24: Risk Management*.

3.45 The template was used by the Senior Project Manager (Major Projects Canberra), as the Chair of the first Tender Evaluation Team, to develop a Procurement Risk Management Plan for the procurement. The Plan was an attachment to the *Procurement Plan Minute* (July 2019). The Plan identified a total of 26 risks that covered thematic areas such as the tender process, tender documentation, statutory approvals, agency capacity and capability, the program, project budget and site tenure and condition that were relevant at the commencement of the procurement. Six risks were rated as 'high' and the remaining 20 were rated as 'medium'. All risks had treatments identified with responsible owners to manage each risk. The effectiveness of these treatments for all 26 risks was reported as 'adequate'.

3.46 There was no evidence that the Procurement Risk Management Plan was used as an ongoing management tool during the procurement process to monitor and report on risks throughout the procurement. The Plan was not updated during the procurement process, including at key developments of the procurement process which appear to give rise to additional or enhanced risks such as:

- the decision to amend the procurement process, to incorporate a Best and Final Offer process; and
- the decision to change tender evaluation team members.

3.47 The Procurement Risk Management Plan was also not updated during contract negotiations with Lendlease, after its identification as the preferred tenderer. By not reviewing and updating the Procurement Risk Management Plan as necessary during the procurement,

there was a missed opportunity to use it as an ongoing tool to help manage the increasing risks associated with the procurement.

- 3.48 A Procurement Risk Management Plan was developed for the Campbell Primary School Modernisation Project procurement. The Plan was an attachment to the *Procurement Plan Minute* (July 2019). The Plan identified a range of risks that were relevant at the outset of the procurement, with related treatments and responsible owners identified to manage each risk. There was no evidence that the Procurement Risk Management Plan was reviewed or updated during the procurement process. By not reviewing and updating the Procurement Risk Management Plan as necessary during the procurement, there was a missed opportunity to use it as an ongoing tool to help manage the increasing risks associated with the procurement.

Probity planning and probity risk management

- 3.49 The *Probity in Procurement Guide* (May 2021) states:

Territory Entities should assess the level of probity risk by completing a risk assessment during the planning stage of a procurement to establish the appropriate risk rating and inform the decision as to appropriate risk treatments.

- 3.50 The *Probity in Procurement Guide* (May 2021) further states:

Probity risks identified in the checklist should be addressed in the procurement's risk management plan. Risk management plans are not static documents. They should be reviewed and corresponding treatments should be adjusted as appropriate throughout the procurement at specified milestones or timeframes, when circumstances change, or when a risk is realised or retired.

- 3.51 The *Probity in Procurement Guide* (May 2021) also provides for the development of a probity plan in certain circumstances:

A probity plan details the agreed probity arrangements for a particular procurement to ensure an appropriate level of governance and application of this Guide and address any specific probity risks. A probity plan should include:

- overview of the procurement
- governance for the procurement
- the agreed procurement processes
- how probity principles will be applied during each stage of the procurement
- roles and responsibilities, including how probity will be assured (for example, through a governance structure, by engaging a probity advisor and/or probity auditor)
- the nature and timing of assurances to be provided by a probity advisor and/or probity auditor during a procurement process, including assurance through written reports.

- 3.52 The *Probity in Procurement Guide* (May 2021) further states:

Provided that probity principles are well understood and applied consistently, a rating of low risk does not generally require a probity plan. A probity plan is typically used for a rating of medium to high /extreme risk. A Probity Statement ... may be used for a low risk rating.

Major Projects Canberra probity guidance

- 3.53 The Infrastructure Delivery Partners Group in Major Projects Canberra has developed a two-page *Probity Statement* to foster an understanding of probity and its application to procurement activities.
- 3.54 The *Probity Statement* provides general and high-level principles on aspects of procurement including:
- maintaining confidentiality of information;
 - handling of documents;
 - managing conflicts of interest;
 - managing communication with tenderers; and
 - recording of communications.
- 3.55 The *Probity Statement* also prompts staff to consider the circumstances in which they may engage a Probity Adviser or Probity Auditor. The *Probity Statement* does not provide staff with explicit processes and mandatory steps that must be followed for procurement activities or the processes that must be followed based on the risks associated with the procurement.

Probity risk management

- 3.56 There was limited consideration of probity in the Procurement Risk Management Plan. One probity-related risk was identified as follows:
- Unethical tender process or inadequate tender and evaluation leads to a breach of probity.
- 3.57 The controls to manage this risk, rated as 'effective', are stated as:
- IFCW [Infrastructure, Finance and Capital Works] to conduct the tender process in accordance with probity guidelines;
- Tender Evaluation Team to conduct evaluation in accordance with the approved Tender Evaluation Plans;
- Appoint experienced representatives on the Tender Evaluation Team; and
- Probity Adviser to be consulted as required.
- 3.58 Similar to the earlier comments on the use of the Procurement Risk Management Plan, and risk management more generally, there is no evidence that this probity risk was monitored and reported against throughout the procurement. The risk was not updated, and the controls re-assessed, at key developments of the procurement process which appear to give rise to additional or enhanced risks.
- 3.59 Whilst the Procurement Risk Management Plan goes some way in highlighting the risk of probity, it did not identify that a Probity Plan be developed as a risk control. No Probity Plan was prepared at any point during the conduct of the Campbell Primary School Modernisation Project procurement.

3.60 There was limited consideration of probity considerations in the Procurement Risk Management Plan. One probity-related risk was identified (unethical tender process or inadequate tender and evaluation leads to a breach of probity) for which the controls to manage this risk were identified as 'effective'. There is no evidence that this probity risk was monitored and reported against throughout the procurement; the risk was not updated, and the controls re-assessed, at key developments of the procurement process which appeared to give rise to additional or enhanced risks.

RECOMMENDATION 3 RISK MANAGEMENT

Major Projects Canberra, in cooperation with Procurement ACT, should review and update its procedures for the management of risk as part of procurement processes. The revised procedures should require procurement managers to actively review risks, including probity risks, and their treatment throughout the entire process. The review should be explicitly documented.

Conflicts of interest

3.61 The *Tender Evaluation Plan* (July 2019) states:

The members of the evaluation team and advisors are required by the Probity and Ethical Behaviour Circular (PC21) and (if relevant) the Probity Plan (consistent with probity obligations in the *Government Procurement Act 2001* (ACT)) to disclose any actual or apparent conflict of interest and take steps to avoid that conflict.

3.62 The *Tender Evaluation Plan* (July 2019) further states:

Without limiting the Probity Plan (if any), all disclosures of conflicts of interests will be fully documented. Evaluation team members, specialist advisors and Consultants will be required to provide written acknowledgement of confidentiality and declaration of conflicts of interest prior to the commencement of the evaluation process using the appropriate form.

3.63 Major Projects Canberra has developed a *Confidentiality and Conflict of Interest Undertaking* form, through which it seeks participants in the procurement process to:

- recognise and acknowledge their obligations with respect to maintaining the confidentiality of the procurement process; and
- identify and acknowledge any potential conflicts of interest they may have with respect to the procurement.

3.64 The *Confidentiality and Conflict of Interest Undertaking* form seeks participants in the process to:

... warrant to the Territory that, to the extent to which any Organisations' names are known to me as at the date of this Undertaking, no conflict of interest exists or is likely to arise during the course of my involvement with the Project ...

- 3.65 A *Confidentiality and Conflict of Interest Undertaking* form was evident for:
- the four members of the first Tender Evaluation Team, including the three that were identified as having evaluation responsibilities and the fourth that was identified as having a role as an Observer; and
 - two of the three members of the second Tender Evaluation Team. The Audit Office was advised that a form was completed for the third member, but it was unable to be produced.
- 3.66 None of the *Confidentiality and Conflict of Interest Undertaking* forms identified any potential conflicts of interest for the participants.
- 3.67 A *Confidentiality and Conflict of Interest Undertaking* form was not prepared for any of the other participants in the procurement process, including:
- managers and supervisors from both Major Projects Canberra and the Education Directorate that were identified as having an ‘oversight’ and ‘quality assurance’ role; and
 - the Delegate for the procurement (the Acting Executive Group Manager, Business Services Division (Education Directorate)).
- 3.68 In its response to the draft proposed report, Major Projects Canberra noted the requirement for ACT Public Service executives to complete an annual *Declaration of Private Interests*.
- 3.69 The *Tender Evaluation Plan* (July 2019) required ‘evaluation team members, specialist advisors and Consultants ... to provide written acknowledgement of confidentiality and declaration of conflicts of interest prior to the commencement of the evaluation process using the appropriate form’. To assist with this Major Projects Canberra has developed a *Confidentiality and Conflict of Interest Undertaking* form’. A *Confidentiality and Conflict of Interest Undertaking* form was evident for five of the six members of the Tender Evaluation Teams that had responsibility for evaluating the tenders as well as the officer identified as having an Observer role for the first Tender Evaluation Team (the Audit Office was advised that a form was completed for one of the members of the Second Evaluation Team but it was unable to be produced). No forms were prepared for any of the other participants in the procurement process. By not ensuring that a *Confidentiality and Conflict of Interest Undertaking* form is completed by all participants in the procurement process, Major Projects Canberra is not rigorously and comprehensively ensuring that all potential conflicts of interest are acknowledged as appropriate.

RECOMMENDATION 4 CONFIDENTIALITY AND CONFLICT OF INTEREST UNDERTAKINGS

Major Projects Canberra, in cooperation with Procurement ACT, should review and update its procedures for the management of confidentiality and conflicts of interest as part of procurement processes. The revised procedures should require *Confidentiality and Conflict of Interest Undertaking* forms to be completed for all staff who have a role in a procurement process.

RECOMMENDATION 5 PROBITY AWARENESS TRAINING

Major Projects Canberra and the Education Directorate should require staff to have received probity awareness training before participating in procurement activities. The training should also identify how staff can elevate and raise any concerns with probity or conduct during a procurement.

Communication with tenderers

3.70 Appropriate, controlled and transparent communication processes are necessary in a procurement process to ensure all suppliers are dealt with fairly and equitably. The Major Projects Canberra *Probity Statement* provides guidance to staff on managing communication with tenderers. The *Probity Statement* states:

All communication with organisations external to the Tender Evaluation Team is to be approved by the Chairperson of the Tender Evaluation Team.

All contact with Tenderers, for example, requesting additional information or holding formal interviews, is to be conducted with prior approval of the Chairperson of the Tender Evaluation Team.

3.71 The *Probity Statement* also states:

All communications with tenderers are to be documented during the evaluation process.

3.72 Neither the *Procurement Plan Minute* (July 2019) or *Tender Evaluation Plan* (July 2019) provided any guidance or instruction to participants in the procurement process with respect to how communication with tenderers should be managed. No specific Communications Plan or Communications Protocol was developed or implemented.

3.73 The Chair of the first Tender Evaluation Team was identified as the key point of contact for procurement process, and they continued in this role after the establishment of the second Tender Evaluation Team. This was done in order to achieve consistency. In an interview under oath or affirmation the Chair of the first Tender Evaluation Team advised:

I was the main point of contact during the REOI and RFT ... through the whole process. ... [I] was the point of contact for all contractors and/or tenderers ... it was to maintain some consistency of who the tenderers had to deal with in ACT Government.

3.74 Communication with tenderers was not appropriate, controlled or adequately documented. There was evidence of:

- individual communication with tenderers – communication on administrative processes and updates were provided to tenders individually and not collectively;
- communication not being recorded – there is evidence at least one tenderer was seeking information on the status of the procurement on a regular basis. This communication and the responses was not recorded;
- communication with third parties in relation to the procurement process.

3.75 In response to the draft proposed report the chair of the Tender Evaluation Team advised that both Manteena and Lendlease regularly sought clarity on the timing of the procurement and both were provided with updates on the procurement timeframes as they were known.

3.76 There was no single repository of communication that occurred with respect to the procurement.

3.77 With respect to communication with third parties, on 3 April 2020 the Acting Executive Group Manager, Business Services Division (Education Directorate) provided an update to the Master Builders Association of the ACT:

I need to have a conversation with the Campbell tenderers about a next step as it is a challenge. I just rang Manteena & left a message. LL will get a call after this meeting.

3.78 Furthermore, the email response from the Master Builders Association of the ACT indicates that the Association had some weight in how both Manteena and Lendlease were dealt with. The return email states:

I think a phone call to Manteena and LL [Lendlease] today will help.

3.79 **Appropriate, controlled and transparent communication processes are necessary in a procurement process to ensure all suppliers are dealt with fairly and equitably. Communication with tenderers was not appropriate, controlled or adequately documented. There was evidence of: individual communication with tenderers; communication not being recorded; and communication with third parties in relation to the procurement process. No specific Communications Plan or Communications Protocol was developed or implemented for the procurement. By not consistently and transparently communicating with tenderers, and communicating with third parties in relation to the procurement, the probity risks associated with the procurement process are increased.**

Tender debrief process

3.80 It is usual procurement practice to conduct a post tender debrief with unsuccessful tenderers. Through a tender debrief process, unsuccessful tenderers seek information on

why they were not selected and it is also a useful process to help them identify how they can improve future tender submissions.

3.81 The *Tender Evaluation Plan* (July 2019) identified that the Tender Evaluation Team would be responsible for 'debriefing unsuccessful respondents'. The usual practice was for the tender debrief process to be facilitated by Major Projects Canberra staff, who typically occupy the position of the chair of the tender evaluation team.

3.82 The Director-General of Major Projects Canberra instructed that the tender debrief process was to be undertaken by Education Directorate representatives and that no Major Projects Canberra staff were to be involved.

3.83 On the basis of information provided in interviews under oath or affirmation, it is apparent that a meeting occurred online on 28 July 2020 and it is apparent that it was attended by representatives of Manteena as well as:

- the Acting Executive Group Manager, Business Services Division (Education Directorate); and
- the two Education Directorate members of the second Tender Evaluation Team.

3.84 There is no documentary evidence or meeting record to identify what was discussed at the meeting on 28 July 2020. Both Education Directorate members of the second Tender Evaluation Team recalled, in interviews under oath or affirmation, participating in a tender debrief discussion online.

3.85 In an interview under oath or affirmation the Acting Executive Group Manager, Business Services Division (Education Directorate) did not specifically recall an online tender debrief session occurring. They recalled that they and the Senior Director, Major Projects Section (Education Directorate) met with representatives in person at a coffee shop. The Acting Executive Group Manager, Business Services Division (Education Directorate) advised:

... we absolutely told Manteena that it wasn't a debrief, because the debrief needed to come back, and they needed to talk to Major Projects Canberra about that.

- 3.86 The Acting Executive Group Manager, Business Services Division (Education Directorate) further advised in an interview under oath or affirmation:

Manteena wrote to the Director-General, either once or twice ... and they wanted to understand why they didn't get the job or whatever, by that stage it was probably why they didn't get the job or why they weren't preferred, something along those lines. I think by that stage that we'd nominated LendLease, or LendLease was preferred, and Manteena knew that they weren't preferred, so they wanted to go there. So, they wanted to discuss that, Major Projects Canberra didn't want to do a debrief, and Manteena were writing to our Director-General to do that. So, we ... then set up that meeting with Manteena to discuss with them where that goes to. That was [Senior Director, Major Projects Section (Education Directorate)] and I and [representatives] of Manteena and we met out at Kingston and had a conversation around those things, and we walked through our assessment if you like, converse on my assessment, on the tender with them, and tried to be as forthright as possible around what they needed to work on.

...

Essentially it was very similar to what a debrief was, but it wasn't the debrief.

- 3.87 In response to the draft proposed report and the statement 'it is apparent that a tender debrief occurred online' both the Education Directorate and Acting Executive Group Manager, Business Services Division (Education Directorate) advised that an online debrief session was originally scheduled for 27 July 2020 but that this was cancelled. The Education Directorate advised 'this online debrief did not occur' and the Acting Executive Group Manager, Business Services Division (Education Directorate) advised 'I'm not aware of an online briefing having occurred at any stage'. In its response to the draft proposed report Manteena advised 'for a matter of fact, the online tender debrief did take place on 28 July 2020' with the participants identified in paragraph 3.84. The Education Directorate and Acting Executive Group Manager, Business Services Division (Education Directorate) further reiterated the role of the Tender Evaluation Team in debriefing unsuccessful respondents (as outlined in paragraph 3.31 and noted that 'this did not occur however as MPC staff were directed not [to] participate in a debriefing process'.
- 3.88 A tender debrief process is useful for unsuccessful tenderers to identify why they were not selected and how they can improve future tender submissions. The *Tender Evaluation Plan (2019)* identified that the Tender Evaluation Team would be responsible for 'debriefing unsuccessful respondents'. The usual practice was for the tender debrief process to be facilitated by Major Projects Canberra staff, who typically occupy the position of the chair of the tender evaluation team. Following the decision to appoint Lendlease as the preferred tenderer, contrary to the recommendation of the Tender Evaluation Team, the Director-General of Major Projects Canberra instructed that the tender debrief process was to be undertaken by Education Directorate representatives and that no Major Projects Canberra staff were to be involved.
- 3.89 On the basis of information provided in interviews under oath or affirmation, it is apparent that a meeting occurred online to discuss the tender process and it is apparent that it was attended by representatives of Manteena, the Acting Executive Group Manager, Business Services Division (Education Directorate) and the two Education Directorate members of the second Tender Evaluation Team. There is no documentary evidence or record

maintained by the Education Directorate of this meeting. Participants recalled the tender process and assessment was discussed at this meeting. The Acting Executive Group Manager, Business Services Division (Education Directorate) recalled another meeting taking place in a coffee shop at which the tender process and assessment was discussed and this 'was very similar to what a debrief was, but it wasn't the debrief'. Notwithstanding the meetings at which the tender process and evaluation was discussed the Education Directorate and Acting Executive Group Manager, Business Services Division (Education Directorate) advised that the absence of Major Projects Canberra staff meant that a tender debrief did not occur. A tender debrief was not conducted in an open, transparent and accountable manner.

RECOMMENDATION 6 TENDERER COMMUNICATION PROCESSES

Major Projects Canberra, in cooperation with Procurement ACT, should review and revise its procurement planning and tender evaluation templates and guidance documents to require, during the tender process, that:

- a) unless otherwise authorised by the chair of the tender evaluation team, the chair be solely responsible for communicating with tenderers in relation to the tender up until the delegate has approved a preferred tenderer; and
- b) the identification and authorisation of communication methods that allow records of communication to be captured in a timely and accurate manner.

APPENDIX A: TIMELINE OF PROCUREMENT EVENTS

24 June 2019	<i>Tender Evaluation Plan</i> prepared.
10 July 2019	<i>Procurement Plan Minute</i> approved by the Executive Group Manager, Business Services (Education Directorate). The Minute identified the Tender Evaluation Team and included a Risk Management Plan (Attachment A) and the Tender Evaluation Plan (Attachment B).
30 July 2019	Request for Expressions of Interest (REOI) issued.
27 August 2019	Request for Expressions of Interest (REOI) closed.
9 October 2019	REOI Evaluation Report completed.
14 October 2019	REOI Evaluation Report approved by the Executive Branch Manager, Infrastructure and Capital Works (Education Directorate).
30 October 2019	Request for Tender (RFT) issued.
23 January 2020	Request for Tender (RFT) closed.
Undated	The first Tender Evaluation Team prepared a draft Tender Evaluation Report which recommended Manteena be approved as the preferred tenderer.
28 February 2020	Meeting to discuss the draft Tender Evaluation Report with attendees from the Education Directorate and Major Projects Canberra.
5 March 2020	Legal advice sought from ACT Government Solicitor's Office on possibility of conducting a Best and Final Offer (BAFO) process.
12 March 2020	ACT Government Solicitor's Office provides advice on possibility of conducting a BAFO process.
16 March 2020	Legal advice sought from ACT Government Solicitor's Office on BAFO process documentation.
18 March 2020	ACT Government Solicitor's Office provides advice on BAFO process documentation.
18 March 2020	The first Tender Evaluation Team produces a second tender evaluation report recommending a BAFO process involving Lendlease and Manteena.
27 March 2020	First Tender Evaluation Team disbanded and a second Tender Evaluation Team installed.
6 April 2020	Second Tender Evaluation Team produces a third tender evaluation report recommending a BAFO process involving Lendlease and Manteena.
7 April 2020	BAFO request issued to Manteena and Lendlease.
8 April 2020	Third tender evaluation report provided on 6 April 2020 approved by the Acting Executive Group Manager, Business Services Division (Education Directorate).
6 May 2020	Request for BAFO closed.

5 June 2020	The second Tender Evaluation Team produces a fourth tender evaluation report, recommending Manteena as the preferred tenderer.
22 June 2020	Acting Executive Group Manager, Business Services Division (Education Directorate) provides Executive Brief to Director-General recommending entering into a contract with Lendlease.
25 June 2020	Director-General agrees to recommendation from 22 June 2020 Executive Brief.

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